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No. 93-1187

IN THE
Supreme Court of the United States
OCTOBER TERM, 19

TORWICO ELECTRONICS, INC.,
Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an order by a government environmental agency, requiring a corporate chapter 11 debtor to spend assets of its estate to clean up property not owned or occupied by the debtor, constitutes a dischargeable "claim" within the meaning of section 101(5) of the Bankruptcy Code, as interpreted by the Court in *Ohio v. Kovacs*, 469 U.S. 274 (1985).

PARTIES TO THE PROCEEDING

The petitioner is Torwico Electronics, Inc., a debtor under Chapter 11 of the United States Bankruptcy Code.[1] The respondent is the New Jersey Department of Environmental Protection and Energy. Although not a party to this case, George Allen Associates has a direct interest in its outcome.

[1] Torwico Electronics, Inc. has no parent corporation or subsidiaries.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Torwico Electronics, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, *infra* pp. 1a-13a, is reported at 8 F.3d 146 (3d Cir. 1993). The opinion of the District Court, *infra* pp. 16a-21a, is reported at 153 B.R. 24 (D.N.J. 1992). The opinion of the Bankruptcy Court, *infra*

pp. 22a-60a, is reported at 131 B.R. 561 (Bankr. D.N.J. 1991).

JURISDICTION

The judgment of the Court of Appeals in this case was entered by an opinion and judgment filed October 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED[2]

11 U.S.C. § 101(5)

"claim" means --

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

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[2] This provision previously was codified at 11 U.S.C. § 101(4).

STATEMENT OF THE CASE

Petitioner Torwico Electronics, Inc. ("Torwico") is a debtor under title 11, chapter 11 of the United States Code ("Bankruptcy Code"). Beginning in 1961, Torwico operated a manufacturing facility on leased premises on New Hampshire Avenue in Lakewood, New Jersey.

In September 1985, Torwico's lease expired and the company moved its operations to a property located on Oberlin Avenue, also in Lakewood, New Jersey. The company has not had any property interest in the New Hampshire Avenue property since vacating the premises in 1985. JA 16.[3] Torwico conducted business at the Oberlin Avenue property from September 1985 until its assets were liquidated in accordance with a December 1992 order of the bankruptcy court.

Torwico's cessation of manufacturing operations at New Hampshire Avenue triggered Torwico's obligation under the New Jersey Environmental Cleanup Responsibility Act ("ECRA")[4] to notify the state and clean up any hazardous substance contamination on the property. Torwico complied with ECRA's notice requirements by informing the New

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[3] Citations to "JA" refer to the Joint Appendix filed by the parties before the Third Circuit below.

[4] ECRA, enacted by the New Jersey legislature in 1983 and substantially amended in 1993, requires the owner or transferror of certain industrial property to notify the state of a pending property transfer or cessation of industrial operations and, if necessary, to conduct a state-supervised cleanup as a precondition to transfer of the property. *See* N.J. Stat. Ann. §§ 13:1k-6 *et seq.* (1991) (amended by 1993 N.J. Laws 139). Under ECRA, the tenant and landlord are jointly and severally liable for cleanup obligations. *See Russell-Stanley Corp. v. Plant Indus., Inc.*, 595 A.2d 534, 545 (N.J. Super. Ct. Ch. Div. 1991) (under ECRA, State may order landlord to clean up property contaminated by a former tenant).

Jersey Department of Environmental Protection (since renamed the Department of Environmental Protection and Energy, "NJDEPE") that hazardous wastes were removed from the site regularly by Torwico's solvent supplier. JA 221. On April 22, 1985, however, an NJDEPE inspector visited the New Hampshire Avenue property and observed stained soils. The NJDEPE required Torwico to conduct sampling and the results indicated the presence of contamination in soils. JA 222. The NJDEPE required Torwico to sample groundwater beneath the New Hampshire Avenue property and Torwico retained an environmental consultant to conduct a groundwater investigation. JA 224.

In April 1988, Torwico entered into an agreement with its former landlord, George Allen Associates ("George Allen"), to share the cost of further environmental assessment and remediation in accordance with their obligations to the State under ECRA. JA 37. To expedite the cleanup, George Allen took charge of the actual cleanup work, assumed responsibility for obtaining all necessary approvals from the NJDEPE, and paid the cleanup costs. Torwico agreed to reimburse George Allen for fifty percent of the cleanup costs. JA 203. The cleanup proceeded under NJDEPE supervision. In March 1989, workers discovered additional contamination emanating from a septic system containing hazardous substances. JA 203.

For unrelated business reasons, Torwico filed a petition for reorganization under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey on August 4, 1989. Torwico listed the Attorney General of New Jersey, the NJDEPE and George Allen as unsecured creditors holding disputed claims regarding Torwico's liability for the cleanup of environmental contamination at the New Hampshire Avenue property. JA 24. On October 4, 1989, the bankruptcy court issued an order

scheduling the first meeting of creditors, notifying creditors of the automatic stay and establishing January 2, 1990 as the bar date for creditors to file proofs of claim. On the same day, the bankruptcy court served copies of that order, by mail, on the Attorney General of New Jersey and the NJDEPE. JA 254. The State, however, never filed a proof of claim with the bankruptcy court.

On November 13, 1989, eight months after discovery of the septic system and almost two months before the bar date for claims, an NJDEPE investigator issued two notices of violation to the company regarding the New Hampshire Avenue septic system. JA 203-204.[5] The first alleged that Torwico had violated provisions of the New Jersey Spill Compensation and Control Act ("Spill Act"), N.J. Stat. Ann. §§ 53:10-23.11c, 53:10-23.11e, by discharging hazardous substances and by failing to report those discharges to the State.[6] The second alleged that Torwico had disposed of hazardous wastes into the septic system without first obtaining a permit to operate a hazardous waste facility, in violation of regulations promulgated pursuant to the New Jersey

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[5] The NJDEPE also issued a third notice of violation, alleging that Torwico had failed to obtain a new hazardous waste generator identification number from the U.S. Environmental Protection Agency when it moved from New Hampshire Avenue to Oberlin Avenue in 1985. Torwico subsequently obtained the proper identification number for its Oberlin Avenue plant and has never asserted that the Bankruptcy Code in any way affected its obligation to comply with regulatory requirements applicable to its continuing operations at the Oberlin Avenue property.

[6] The Spill Act prohibits the discharge of hazardous substances. In the event of a discharge, the Spill Act gives the NJDEPE authority to: (1) order the discharger to clean up or (2) conduct the cleanup itself, using money from a designated fund, and then recover those costs from the discharger. *See* N.J. Stat. Ann. § 58:10-23.11f(a), (f).

Solid Waste Management Act ("SWMA"). *See* N.J. Admin. Code tit. 7, § 26-12.1(a). Subsequently, the NJDEPE issued an administrative order to Torwico requiring Torwico to clean up the septic system and assessing a civil penalty of $22,500.00 for violation of the SWMA.[7] In August 1990, the NJDEPE issued another notice of violation to Torwico and George Allen, alleging that both had failed to comply with provisions of ECRA. JA 366-67.

Torwico filed an adversary proceeding in the bankruptcy court[8] seeking a declaration that its alleged liability to the State constituted an unsecured "claim" within the meaning of section 101(5) of the Bankruptcy Code because Torwico could comply only by paying an environmental contractor to perform the necessary cleanup.[9] The State's answer to the complaint asserted that Torwico's obligations to clean up its former property under ECRA, the SWMA, and the Spill Act constituted "ongoing regulatory obligations" which could not be discharged as "claims" in bankruptcy.

On cross-motions for summary judgment, the bankruptcy court held for Torwico that the NJDEPE's cleanup order was

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[7] The NJDEPE order is reproduced at pp. 61a-67a, *infra*.

[8] Federal subject matter jurisdiction over the proceeding existed pursuant to 28 U.S.C. § 1334(a). Jurisdiction of the bankruptcy court existed pursuant to 28 U.S.C. § 157(b).

[9] *See* 11 U.S.C. § 101(5). At the time Torwico filed the complaint in this proceeding the definition of "claim" was codified at section 101(4) of the Bankruptcy Code, 11 U.S.C. § 101(4). The recodification did not change the language of the section. For purposes of clarity and consistency, the section is identified throughout this Petition as 101(5), even when reference is made to cases decided prior to the recodification.

an unsecured "claim."[10] The bankruptcy court held that, under this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985), "where a debtor in bankruptcy cannot clean up environmental contamination himself or itself without paying money, the obligation to clean up pursuant to an injunction is a debt which is dischargeable in bankruptcy." 131 B.R. at 570 (*infra* p. 39a). Because Torwico could comply with the NJDEPE's administrative order only by spending money, the bankruptcy court concluded that Torwico's liability to the State was a "claim" under section 101(5) of the Bankruptcy Code. The bankruptcy court also held that the State had forfeited its right to participate in any distribution of funds under Torwico's plan of reorganization by failing to file a proof of claim before the bar date. 131 B.R. at 573 (*infra* pp. 47a-49a). The bankruptcy court further held that provisions of ECRA which purport to dictate the treatment of cleanup obligations in bankruptcy are void under the Supremacy Clause, U.S. Const. Art. VI, § 2.[11]

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[10] *Infra* pp. 31a-47a. The bankruptcy court subsequently signed an order entering judgment for Torwico on September 20, 1991.

[11] 131 B.R. at 573-78 (*infra* pp. 49a-56a). The ECRA provision in question provided:

> No obligations imposed by this act shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this act shall constitute continuing regulatory obligations imposed by the state.

N.J. Stat. Ann. § 13:1k-12 (1991). The constitutionality of this provision was not considered by either the district court or the Third Circuit below. Paragraph 15 of the NJDEPE's administrative order contained similar language. *See infra* p. 66a.

The State appealed the bankruptcy court's judgment to the district court, which reversed.[12] The district court distinguished *Kovacs* on the grounds that in *Kovacs* the State of Ohio had admitted in oral argument that the only performance sought from the debtor was the payment of money. Concluding that the NJDEPE in this case had no alternative payment remedy, the district court held that Torwico's cleanup obligation was not a dischargeable claim under the Bankruptcy Code. 153 B.R. at 26 (*infra* pp. 19a-20a).

Torwico appealed the district court's decision to the United States Court of Appeals for the Third Circuit, which affirmed.[13] The Third Circuit concluded that New Jersey was not seeking money from Torwico and had no right to payment under the statutory authority asserted in the administrative orders. Torwico's cleanup obligations were ongoing, the court concluded, because they "run with the waste" and apply regardless of where the waste may be located. The court thus ruled that New Jersey's right to enforce its order was not a "claim" under the Bankruptcy Code and therefore was a non-dischargeable obligation of the debtor.

SUMMARY OF ARGUMENT

The Third Circuit's decision conflicts with the decision of this Court in *Ohio v. Kovacs*, 469 U.S. 274 (1985). In *Kovacs*, this Court ruled that the Bankruptcy Code defines the term "claim" broadly to include the obligation of a debtor to spend money to comply with a government injunc-

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[12] The district court had jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a).

[13] The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

tion requiring an environmental cleanup. This Court acknowledged in *Kovacs* that a debtor who continues to own or possess property must operate its property in compliance with environmental laws. However, the Court ruled that where a debtor's legal rights to own or occupy the property have been cut off—in that case by the appointment of a receiver—the obligation to spend money to pay for a cleanup is a "claim" subject to discharge in bankruptcy.

In this case, Torwico never owned the contaminated property and its right of occupancy ended with the expiration of its lease, almost four years prior to the commencement of the bankruptcy case. Thus, like the debtor in *Kovacs*, Torwico has no continuing right of ownership or possession over the property subject to the cleanup order. Under the reasoning in *Kovacs*, the State's right to compel Torwico to pay for a cleanup is a "claim" under the Bankruptcy Code.

The Third Circuit's decision not only conflicts with *Kovacs*, but also with the decisions of other Circuit Courts of Appeals. *See United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988); *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992). In *Whizco*, the Sixth Circuit applied Kovacs in ruling that a government order compelling the debtor, a former coal mine operator, to spend money to reclaim a mine was a dischargeable claim under the Bankruptcy Code. Similarly, the Seventh Circuit, in *CMC Heartland*, applied the logic of *Kovacs* to distinguish between the case where a debtor's environmental liabilities are based on its actions as a former site operator, and are thus dischargeable claims, and the case where the environmental liabilities are based on the debtor's current status as a property owner or operator, and thus may not be dischargeable. In contrast, the Third Circuit below held that the debtor's cleanup obligation survives bankruptcy regardless of whether the debtor continues to own or occupy the property involved.

The decision below is unsupported by the language of section 101(5) and subverts the fundamental policies underlying the Bankruptcy Code: (1) providing equal treatment to all similarly-situated creditors, and (2) affording debtors a fresh start when they emerge from bankruptcy. Ruling that cleanup obligations are not "claims," as the Third Circuit did, requires that the State's interest takes precedence over the claims of other legitimate creditors. As the drafters of the Bankruptcy Code recognized, such disguised priorities prejudice other creditors and undermine a debtor's opportunity for a fresh start. In particular, corporate debtors facing liabilities of unknown magnitude which pass through the bankruptcy to the reorganized entity may be denied the financing and new investment necessary to reorganize. Cut off from lenders and investors and unable to resolve their liabilities in the bankruptcy, otherwise salvageable enterprises are more likely to liquidate, resulting in the loss of jobs and economic resources.

A writ of certiorari should be issued in this case to ensure that this Court's ruling in *Kovacs* is properly followed, to avoid inconsistencies among the Circuit Courts of Appeals, and to give effect to the important policy choices which Congress incorporated into the Bankruptcy Code.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S INTERPRETATION OF THE DEFINITION OF "CLAIM" IN *OHIO V. KOVACS*

A. This Court Repeatedly Has Held that the Definition of "Claim" Should Be Broadly Construed

The Bankruptcy Code provides for the discharge of debts, subject to specified exceptions. *See* 11 U.S.C. §§ 727

(chapter 7 discharge), 1141(d)(1)(A) (chapter 11 discharge), 523 (exceptions to discharge). Discharge of debts is the primary benefit which debtors receive under the Bankruptcy Code. The discharge gives effect to Congress' policy decision that debtors are entitled to a fresh start, free of all prior debts, on the theory that a financially-rehabilitated corporation is of greater social value than a liquidated one. The Bankruptcy Code is therefore designed to ensure that all of a debtor's liabilities can be addressed in the bankruptcy case.

The term "debt" is defined as "liability on a claim." 11 U.S.C. § 101(12). A "claim," in turn, is broadly defined as any "right to payment, whether or not such right is...contingent,...disputed,...equitable,...or unsecured" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment."[14]

Starting with *Ohio v. Kovacs*, 469 U.S. 274 (1985), this Court has concluded that the terms "claim" and "right to payment" should be construed broadly to permit the most comprehensive discharge of the debtor's obligations. 469 U.S. at 279 ("Congress desired a broad definition of 'claim.'"); *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990) (holding that a State's right to enforce a criminal restitution order constituted a "claim," and reasoning that both the term "claim" itself and the phrase "right to payment" were to be read expansively reflecting "Congress' broad rather than restrictive view of the class of obligations that qualify as a 'claim' giving rise to a 'debt'"); *Johnson v. Home State Bank*, ___ U.S. ___, 111

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[14] 11 U.S.C. § 101(5). The full text of section 101(5) is reproduced at p. 2, *supra*. This provision was formerly codified at § 101(4).

S. Ct. 2150, 2154 (1991) ("Congress intended . . . to adopt the broadest available definition of 'claim.'").

In *Davenport*, the Court noted the language in the House Report accompanying the 1978 amendments to the Bankruptcy Code which described the term "claim" as having the "broadest possible" definition, and which noted that the Code "contemplates that *all legal obligations* of the debtor . . . will be able to be dealt with in the bankruptcy case." 495 U.S. at 558 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266) (emphasis added); *accord* S. Rep. No. 989, 95th Cong., 2d Sess. 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5808.

The Third Circuit below erred by failing to give effect to the broad definition of "claim" in the Bankruptcy Code, as interpreted by this Court in *Kovacs, Davenport* and *Johnson*.

B. The Decision Below is in Direct Conflict with the Holding of *Kovacs*.

The Third Circuit's decision is inconsistent with the holding of this Court in *Kovacs*. In *Kovacs*, the Court ruled that the term "claim" included injunctions which require a debtor to spend money for environmental cleanup of property that he no longer operated or possessed.

Kovacs was the chief executive officer and stockholder of a company which owned and operated the Chem-Dyne hazardous waste disposal site in violation of state laws. Ohio obtained an injunction requiring Kovacs to remove existing waste from the site and forbidding Kovacs from bringing additional waste on the property, but Kovacs did not comply. In response, the State obtained the appointment of a receiver who took possession of all of Kovacs' assets, including the

Chem-Dyne site. Kovacs then filed a petition under chapter 7 of the Bankruptcy Code and sought to discharge his obligation to perform a cleanup under the terms of the injunction. The State filed a complaint seeking a declaration that Kovacs' obligation to remove waste from the property was not a "claim" and thus not dischargeable. 469 U.S. at 276-77.

This Court ruled that Kovacs' obligation to comply with the injunction to remove wastes was a "claim" under section 101(5)(B) of the Bankruptcy Code. The Court reasoned that, because Kovacs had no authority over the site and the only way he could comply was to pay to defray the costs of cleanup, the equitable remedy of an injunction had been converted to a right to payment and was thus a "claim" dischargeable in Kovacs' bankruptcy. 469 U.S. at 282-83.

The Court tempered its decision by cautioning that anyone in possession of the site may be subject to cleanup obligations under state law, including Kovacs himself, if he came into possession after the receivership was liquidated. 469 U.S. at 285. Nonetheless, the Court concluded that, where the debtor does not own or possess the affected property, an injunction to perform an environmental cleanup which can only be satisfied by the payment of money is a "claim" that is dischargeable under the Bankruptcy Code.[15]

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[15] The Court's opinion in *Kovacs* was unanimous, but Justice O'Connor wrote separately to explain that the ruling would not leave the state without any recourse against the debtor's assets. As Justice O'Connor noted, *how* the state's interest in the debtor's property is classified in bankruptcy (*i.e.* as a lien, a perfected security interest or a mere unsecured claim) is generally left to state law. *See Kovacs*, 469 U.S. at 285-86 (O'Connor, J., concurring). What the State may not do, as the bankruptcy court in this case decided below, is dictate *whether or not* the State's interest is a "claim" in the first place. *See* 131 B.R. at 576-77

(continued...)

Like the debtor in *Kovacs*, Torwico can comply with the cleanup orders from the State only by paying a contractor to clean up the site.[16] As a corporation, Torwico cannot perform any cleanup action except by paying contractors or employees to do the work. Moreover, even prior to the sale of all its physical assets, Torwico did not have the expertise necessary to conduct an environmental cleanup. Since its liquidation, Torwico has had no employees and no assets except for cash. The only way Torwico could comply, both at the time New Jersey issued its cleanup orders and now, is to pay money to someone qualified to perform the clean-up.[17]

The Third Circuit attempted to justify its decision not to follow *Kovacs*, contending that it was enjoining "continued pollution" because the hazardous substances already in the soil at the New Hampshire Avenue property could continue to migrate. 8 F.3d at 151 (*infra* pp. 10a-11a). This distinction is untenable. In *Kovacs*, this Court faced exactly the

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[15] (...continued)
(*infra* p. 59a) That decision was made by Congress when it enacted section 101(5) under its constitutional authority to establish "uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, cl. 4, and the Supremacy Clause bars any state law to the contrary.

[16] In support of its motion for summary judgment, Torwico filed an affidavit from its president, Robert Savino, stating that Torwico did not have the expertise in environmental sciences necessary to prepare a closure plan, and that if Torwico were compelled to prepare such a plan, it would have to retain an environmental consulting firm to do so. JA 117-19.

[17] New Jersey's own rules specify that an independent, registered professional engineer must certify that a cleanup has been completed according to state-approved standards. N.J. Admin. Code tit. 7, § 26-9.8(l).

same factual situation, noting that at the Ohio property "the ground . . . remains permeated with toxic materials that must be removed if further pollution of the public waters is to be avoided." 469 U.S. at 278. Nonetheless, this Court concluded that because the State was seeking to compel the debtor to pay for a cleanup, the State was enforcing a "right to payment" which constituted a "claim."

Moreover, like the debtor in *Kovacs*, Torwico does not own or possess the property in question. In *Kovacs*, the Court noted that the appointment of a receiver was significant because "it dispossessed Kovacs, [and] removed his authority over the site." 469 U.S. at 283. In this case, Torwico was already dispossessed of the property by virtue of the expiration of its lease almost four years before the bankruptcy filing. Thus, the ruling in *Kovacs* controls this case and the Court should grant certiorari to correct the Third Circuit's error.

The Court of Appeals below also attempted to distinguish *Kovacs* on the basis that New Jersey was not seeking the payment of money, but the performance of work. A close reading of *Kovacs*, however, shows that the State of Ohio also argued that it was seeking the performance of some action and not the payment of money. *See* 469 U.S. at 282-83. This Court looked behind the formalism of Ohio's position to determine the substance of the State's demand:

> The impact of [the State's] attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste . . . . He cannot perform the affirmative obligations properly imposed on him by the State

> court except by paying money or transferring his own financial resources.

469 U.S. at 282 (quoting the Sixth Circuit's decision below, *Ohio v. Kovacs*, 717 F.2d 984, 988 (6th Cir. 1983)). Similarly, Torwico can only comply with New Jersey's cleanup orders by paying an environmental professional to prepare and implement a cleanup plan for the site. New Jersey's purpose in enforcing its orders was made clear early in this litigation: "[T]he government's access to private funds for cleanup purposes must be assured whenever possible, including when private funds are available from an estate in bankruptcy." JA 180 (NJDEPE brief in the bankruptcy court). Thus, what the State is seeking here is not an action by the debtor, but the use of the debtor's funds to pay for the cleanup.

The State argued that its right to equitable relief cannot be reduced to a "right to payment" because it has proceeded under two statutes, the Environmental Cleanup Responsibility Act ("ECRA"), N.J. Stat. Ann. §§ 13:1K-6 *et seq.* (1991), and the Solid Waste Management Act, N.J. Stat. Ann. §§ 13:1E-1 *et seq.*, which the state contends only allow for enforcement through injunctions and do not create a right to sue to recoup cleanup costs. However, the State has the authority to perform the cleanup itself and sue Torwico (and the property owner) to recover the cleanup costs under another statute, the Spill Compensation and Control Act ("Spill Act"), N.J. Stat. Ann. §§ 58:10-23.11 *et seq.*, which the State invoked in its original notice of violation.[18] If the

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[18] *See* p. 5, *supra*. New Jersey courts have concluded that ECRA and the Spill Act apply *in pari materia*. *See Superior Air Products v. NL Indus., Inc.*, 522 A.2d 1025, 1035 (N.J. Super. Ct. App. Div. 1987), *appeal dismissed*, 598 A.2d 872 (N.J. 1991).

State chooses to proceed under ECRA, Torwico would pay the cleanup contractor directly, but if the State decides to take action under the Spill Act, the State would pay the cleanup contractor in the first instance and then attempt to recoup the money from Torwico.[19] Accordingly, New Jersey clearly has a "right to payment" in this case.

In determining whether the State of Ohio's right to enforce an injunction was a claim in *Kovacs*, this Court looked not at the statutory source of these rights, but at the impact of the enforcement of these rights on the debtor. If the only way to comply with the injunction is to pay money, then the cleanup order has been "converted into an obligation to pay money." 469 U.S. at 283.

Finally, this Court held that an enforceable obligation may be a "right to payment" even where the creditor may not sue directly to obtain the money. *Davenport*, 495 U.S. at 559-60. In *Davenport*, the State of Pennsylvania argued that a criminal restitution order did not constitute a right to payment, and therefore was not a "claim" under the Bankruptcy Code, because neither the State nor the victim could sue to enforce payment. This Court ruled that because the restitution obligation could be enforced through other means, such as the revocation of probation or incarceration, it thus was a right to payment for bankruptcy purposes. *Id.* The Court concluded that "[t]he plain meaning of 'a right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." *Id.* at 559.

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[19] In one of its early briefs, the State acknowledged that "[i]f the State had directed Torwico to clean up, and Torwico had not complied and the State performed the cleanup itself, the cost recovery action could be seen as the 'mere collection of a monetary judgment.'" JA 172.

Like *Davenport*, this case involves a state's powers to force a debtor to make a payment to a third party—in this case, a cleanup contractor. Here, the State may enforce its cleanup order by imposing penalties for non-compliance or seeking to have Torwico held in contempt. Thus, under the reasoning in *Davenport* and *Kovacs*, the State is enforcing a "right to payment," which is a "claim" under section 101(5) of the Bankruptcy Code.

II. THE THIRD CIRCUIT'S DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS

In holding that an environmental cleanup injunction is not a claim where the debtor did not own or possess the property to be cleaned up, the Third Circuit's decision is in direct conflict with decisions of the Sixth and Seventh Circuits, and is significantly inconsistent with decisions of the Second and Ninth Circuits. Unless this petition is granted, the obligation to comply with an environmental cleanup order may be a dischargeable claim if a debtor files its bankruptcy petition in Cleveland, but not if the debtor files in Pittsburgh. The Court should issue a writ of certiorari to resolve this inconsistency.

Although the facts of this case are clearly analogous to the facts before the Sixth Circuit in *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988), the two courts reached diametrically opposite conclusions. In *Whizco*, the federal government had issued an order under the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 201 *et seq.*, to the debtor, an individual who formerly operated an abandoned mine, requiring restoration of that mine. The federal government argued that the obligation to comply with the order was not a claim because the govern-

ment was seeking compliance with an injunction, not a payment, and that SMCRA did not give the government the legal right to payment. Relying on *Kovacs*, the Sixth Circuit concluded that the obligation to comply was a "claim" because compliance would require the debtor to pay money:

> It is clear . . . that the defendant does not have the physical capacity to reclaim the mine site himself, and that he would have to hire others to perform the work for him. This would require the expenditure of money. . . . To the extent, therefore, that the injunction would have purpose or value it would require the payment of money. Thus, when we look at the substance of what the plaintiff seeks, rather than the form of relief sought, we see that the plaintiff is really seeking a payment.

Whizco, 841 F.2d at 150. The Sixth Circuit held that the obligation to comply with the injunction was discharged, except to the extent that the debtor could do so without spending money. *Id.* at 151. Here, Torwico, as a corporate debtor, may only comply by spending money.

Although the Third Circuit below stated that its decision follows the Seventh Circuit's decision in *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992), a careful reading of that case reveals that the Third Circuit's holding actually conflicts with the Seventh Circuit's view. In *CMC Heartland*, a railroad, which had owned and operated a hazardous waste site named Wheeler Pit, filed for bankruptcy under the Bankruptcy Act of 1898. A reorganized successor emerged from bankruptcy still owning the site. When the U.S. Environmental Protection Agency issued an administrative order under sections 106 and 107 of the Comprehensive

Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9606, 9607, the reorganized entity, CMC, sought a declaration that the obligation to comply with the injunction was a discharged claim.

The Seventh Circuit ruled that CMC's liability under CERCLA as the operator of Wheeler Pit prior to the date of reorganization constituted a claim which had been discharged, reasoning that "[t]o the extent that §§ 106 and 107 require a person to pay money today because of acts before or during the reorganization proceedings, CERCLA creates a 'claim' in bankruptcy." 966 F.2d at 1146. The Seventh Circuit explained that this result was consistent with the purposes of the bankruptcy law:

> Reading "claim" broadly ensures that those injured by the debtor's hazardous wastes share in the available assets, just as those run down by its trains are entitled to distributions as creditors. Because the United States neglected to file a claim under CERCLA in the reorganization, CMC's liability as the operator or manager of Wheeler Pit before the bar date in 1985 is extinguished.

Id.

However, the Seventh Circuit held that the government could still enforce its injunction against CMC because CMC continued to own Wheeler Pit after emerging from bankruptcy and was the current owner of the site. The court reasoned that because section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), imposes liability on the current owner of a hazardous waste site—even if that current owner did not participate in the disposal of hazardous waste—CMC could still be compelled to implement a cleanup. *CMC Heartland*,

966 F.2d at 1147. The Seventh Circuit described this responsibility as "a statutory obligation attached to *current ownership* of the land [which] survives bankruptcy." *Id.* (emphasis added). Thus, CMC could be compelled to comply with a cleanup order because it owns Wheeler Pit today, not because it was responsible for disposing of waste in the past.

In this case, Torwico is not the current owner or operator of the property which the State has ordered cleaned up. Nonetheless, the Third Circuit concluded that just as liability in *CMC Heartland* "ran with the land," liability in Torwico's case, "ran with the waste," because Torwico allegedly was liable under New Jersey law as the person who generated the waste and arranged for its disposal.[20] This analysis ignored the Seventh Circuit's careful effort to distinguish between liability based on a debtor's pre-bankruptcy acts, which constitute dischargeable claims, and liability based on the ownership of land which may attach to any current landowner, including a debtor who has emerged from bankruptcy. Under the reasoning of *CMC Heartland*, Torwico's obligations as an operator of the site and a generator of waste should be dischargeable claims; Torwico has no liability as a current owner.[21]

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[20] 8 F.3d at 151 (*infra* pp. 11a-12a). Significantly, the law to which the Third Circuit referred is the Spill Act, which the state did not invoke as authority for its administrative order but which does provide the State with the right to recover cleanup costs. *See* N.J. Stat. Ann. § 58:10-23.11f.

[21] Indeed, in another case arising out of the same bankruptcy, *In re Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 974 F.2d 775 (7th Cir. 1992), the Seventh Circuit ruled that the State of Washington's CERCLA claim against CMC was discharged with respect to a property which

(continued...)

The Third Circuit also misapplied the Second Circuit's decision in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991). The *Chateaugay* case involved the question whether the LTV Corporation could discharge its obligations to comply with injunctive orders which EPA may issue or secure from a court under section 106 of CERCLA, 42 U.S.C. § 9606, with respect to sites which the debtor would continue to own or operate after emerging from bankruptcy. In *Chateaugay*, the Second Circuit ruled that an injunction "to ameliorate ongoing pollution" was not a "claim" and would not be dischargeable. 944 F.2d at 1008. But it is clear that the Second Circuit's ruling was limited to situations in which the debtor continues to own the affected property:

> It is difficult to understand how any injunction directing a *property owner* to remedy ongoing pollution could be a dischargeable "claim," if, as *Kovacs* instructs, the *owner* "may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions."[22]

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[21] (...continued)
CMC had sold prior to emerging from bankruptcy. Other circuits have likewise held that CERCLA claims relating to property not part of the bankruptcy estate are dischargeable. *See In re Chateaugay Corp.*, 994 F.2d 997, 1005 (2d Cir. 1991) (contingent claims for reimbursement of CERCLA cleanup costs dischargeable); *In re Jensen*, 995 F.2d 925, 930-31 (9th Cir. 1993) (liability for cost of removing hazardous substances from debtor's former property held to be a dischargeable "claim").

[22] The *Chateaugay* court also concluded that its ruling was consistent with *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental* (continued...)

Chateaugay, 944 F.2d at 1009 (emphasis added) (quoting *Kovacs*, 469 U.S. at 285). Thus, the result in *Chateaugay*, if not the reasoning, is consistent with *CMC Heartland*: debtors who emerge from bankruptcy may be subject to environmental cleanup injunctions at properties which they continue to own. But neither case establishes that a debtor, such as Torwico, may be compelled to use estate assets to clean up property which it never owned and which it vacated almost four years before filing for bankruptcy protection.

Finally, the Third Circuit's decision is inconsistent with the Ninth Circuit's decision in *In re Dant & Russell, Inc.*, 853 F.2d 700 (9th Cir. 1988). Although *Dant & Russell* did not involve an attempt by a government agency to enforce an environmental cleanup injunction, the Ninth Circuit clearly ruled that the obligation imposed by a landlord on a former tenant to clean up leased property should be treated like any other claim in the tenant's bankruptcy. In *Dant & Russell*, a landlord sued its debtor-tenant, demanding the full cost of cleaning up property contaminated by the debtor during the course of an expired lease. The Ninth Circuit relied on *Kovacs* for the conclusion that where a creditor was seeking to require the debtor to perform or pay for the cleanup of property that was not part of the debtor's estate, such an obligation was a general unsecured claim under the Bankrupt-

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[22] (...continued)
Protection, 474 U.S. 494, 507 (1986), in which this Court ruled that a bankruptcy trustee "may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health and safety from identified hazards." If a debtor who does not continue to own or possess property may be compelled to use the assets of the estate to clean up that property, then this Court would have no reason to decide, as it did in *Midlantic*, whether environmental laws limit the bankruptcy power to abandon the property.

cy Code. *Dant & Russell,* 853 F.2d at 708-09. The Ninth Circuit reasoned that to treat such obligations differently would be to create a new bankruptcy priority not provided for by Congress:

> Although [the landlord] asserts that public policy considerations entitle its claims for cleanup costs to administrative expense priority, we acknowledge that Congress alone fixes priorities. . . . Courts are not free to formulate their own rules of super or sub-priorities within a specifically enumerated class.

Id. at 709 (citation omitted).

The Third Circuit's decision has created just such a new priority by requiring a former tenant to exhaust the assets of its estate to complete the cleanup of property which it never owned and does not operate before it may pay its other creditors. This is squarely in conflict with the decision of the Ninth Circuit in *Dant & Russell*, where the Court of Appeals recognized that such a result violates the priority scheme established by Congress in the Bankruptcy Code.

III. THE THIRD CIRCUIT'S DECISION UNDERMINES THE BANKRUPTCY CODE'S POLICIES OF PROVIDING THE DEBTOR WITH A FRESH START AND ASSURING EQUAL TREATMENT OF CREDITORS.

The drafters of the Bankruptcy Code enacted by Congress in 1978 were guided by twin beacons: "the two strong bankruptcy policies of a fresh start for the debtor and the equality of treatment of all creditors." H.R. Rep. No. 595, 95th Cong., 1st Sess. 285 (1977), *reprinted in* 1978 U.S.C.-

C.A.N. 5963, 6242. The Third Circuit's decision in this case not only ignores these two fundamental bankruptcy policies, but undermines each of them.

First, by classifying environmental orders arising from prepetition events as anything other than general unsecured claims, the Third Circuit's decision will result in unequal treatment of similarly situated creditors by elevating the interests of state and federal environmental agencies over the rights of all other unsecured creditors. The funds a debtor is forced to expend to comply with an environmental agency's order—for example, to remediate a landfill to which the debtor shipped waste years prior to the bankruptcy—will be unavailable to pay the claims of lenders, suppliers, contractors, workers, retirees, tort victims, and other legitimate claimants. This result was never intended by Congress. To the contrary, Congress has expressly stated its intent to eliminate such disguised priorities and put all creditors with prepetition claims within the same class on an equal footing:

> [Non-bankruptcy] laws that grant priorities do so at the expense of other creditors and to the detriment of the orderly liquidation and distribution of a bankrupt estate. Thus, the bill, in the interest of a coherent bankruptcy policy, eliminates special priorities found in other laws and brings all priorities into the bankruptcy code itself.
>
> [E]xceptions to discharge not found in the bankruptcy code itself are subject to the same criticism that special priorities are: they are not enacted with balancing of the

> myriad competing interests in the bankruptcy arena, and frequently are contrary to the two strong bankruptcy policies of a fresh start for the debtor and the equality of treatment of all creditors.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 285 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6242. Accordingly, reversal of the Third Circuit's decision is necessary to maintain the policy of equality among creditors.

Second, by allowing environmental cleanup orders relating to pre-bankruptcy conduct at property outside the debtor's estate to escape bankruptcy treatment, the Third Circuit's decision will thwart debtors' efforts to obtain a fresh start and will impede their attempts to reorganize their affairs. In many cases, debtors will be burdened by non-dischargeable liabilities for environmental cleanups, the costs of which may be impossible to ascertain and which may take years to complete. Moreover, the difficulty of projecting the size or timing of such expenditures may make it impossible for a debtor to formulate an effective business plan—the *sine qua non* of a plan of reorganization.

In particular, the decision will frustrate the efforts of corporate debtors to reorganize by denying them access to the financing necessary both to operate during the chapter 11 case, and to emerge from bankruptcy. *See* Martin J. Bienenstock, *Bankruptcy Reorganization* 93 (1987). Lenders and investors will put their money into a reorganizing business if old obligations can be discharged and if the company shows a potential for future profits. But they will not put new money into a company that is subject to continuing cleanup obligations at property the debtor does not own or use in its business, such as a landfill to which the debtor sent waste years ago. *See* CERCLA § 107(a)(3), 42 U.S.C.

§ 9607(a)(3) (imposing strict, joint and several liability on persons who "arranged for disposal...of hazardous substances").

Third, because the Third Circuit's decision has the effect of impeding debtors' efforts to reorganize, otherwise salvageable companies will be compelled to liquidate, costing workers their jobs and leaving other creditors unsatisfied. A corporate liquidation generally reduces the assets available to pay all creditors because the liquidation value of a company is generally less than its going concern value. Liquidations forced by prepetition events are thus antithetical to Chapter 11 of the Bankruptcy Code, which rests on the premise that a rehabilitated company is more socially useful than a liquidated one. As this Court recognized in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983):

> By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. . . . Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if "sold for scrap."

See also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) (reorganization prevents a debtor from having to liquidate "with an attendant loss of jobs and possible misuse of economic resources.")

Finally, as a general matter, the goal of environmental protection will not be prejudiced if this Court decides to overturn the Third Circuit's decision below. Reversal will require the government in most cases to file a claim and receive pro rata payment from the debtor as provided for under a plan of reorganization. In addition, in most cases

where the debtor does not own the affected property, the federal or state government may pursue other responsible parties, not in bankruptcy, to implement the cleanup. In this case, for example, Torwico's landlord is jointly and severally liable with Torwico; to the extent that Torwico cannot be compelled to complete the cleanup, the State may pursue the landlord. Further, at most hazardous waste sites, a substantial number of other responsible parties may be compelled to perform or pay for the cleanup. In fact, it is not unusual to identify more than a hundred responsible parties at a single "Superfund" site. *See, e.g., Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 883 (3d Cir. 1985) (142 companies alleged to be responsible for cleanup costs at a landfill), *cert. denied*, 476 U.S. 1115 (1986). To the extent the government's claims remain unsatisfied, the government may resort to public funds to complete the cleanup. That is a significant reason why the United States Treasury collects substantial, broad-based taxes designated for the CERCLA Hazardous Substance Superfund. *See* CERCLA § 111, 42 U.S.C. § 9611. New Jersey has a similar tax-based fund. *See* N.J. Stat. Ann. § 58:10-23.11f(7).

What the Third Circuit has done below is precisely what this Court refused to do in *Kovacs*: establish a new bankruptcy priority for environmental cleanup obligations which would take precedence over all other prepetition unsecured obligations. This decision not only jeopardizes a debtor's ability to obtain a fresh start, but permits the federal and state governments to consume all of a debtor's unencumbered assets to clean up property that is not part of the debtor's estate, while legitimate private claimants go unpaid. This decision should be reversed.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 24, 1994

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5021

IN RE TORWICO ELECTRONICS, INC.,
Debtor,

TORWICO ELECTRONICS, INC.,
Appellant

v.

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Appellee

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 92-01828)

Argued August 3, 1993
Before:
STAPLETON, HUTCHINSON AND ROTH, *Circuit Judges*
(Opinion Filed October 25, 1993)

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This case involves an attempt by the State of New Jersey to force Torwico Electronics, a debtor in chapter 11 bankruptcy, to comply with its obligations under state and federal environmental laws. Torwico asserts that these obligations are "claims," within the meaning of 11 U.S.C. § 101(5), and that, because the state failed to timely file a proof of claim, it is no longer responsible for them. The state claims that what is involved here are regulatory obligations, not bankruptcy claims. The bankruptcy court decided the issue in Torwico's favor, but was reversed by the district court. We conclude that the district court adopted the correct approach to this issue and will affirm.

I.

Torwico Electronics conducted a manufacturing business from a location in Ocean County, New Jersey until September 1985 when it moved to a new location. The Ocean County site ("the property") was owned by George Allen Associates and was leased to Torwico during the time Torwico did business at that address.

On August 4, 1989, Torwico filed for chapter 11 bankruptcy and listed the New Jersey Department of Environmental Protection and Energy (NJDEPE) on its schedules as a creditor with a disputed and unliquidated claim. On October 4, 1989, the bankruptcy court sent notice to all creditors, including NJDEPE, of Torwico's Chapter 11 bankruptcy and informed them that the last day to file a proof of claim was January 2, 1990. The following month, on November 13, 1989, NJDEPE performed an on-site inspection of the property and found a hidden illegal seepage pit containing hazardous wastes--wastes which were allegedly migrating into local waters. NJDEPE also found that

Torwico was operating at its new site without the identification number required by EPA. NJDEPE immediately issued three notices of violation to Torwico, one concerning the failure to obtain a new identification number at the new place of business, and the others concerning the hazardous wastes found at the property. Torwico claims no knowledge of the seepage pit and the wastes found there.

The January 2, 1990 deadline for filing a proof of claim passed without any filing by NJDEPE. While Torwico did obtain an ID number for its new place of business, it did nothing about the seepage pit at the property. On April 9, 1990, NJDEPE issued an Administrative Order and Notice of Civil Administrative Penalty Assessment to Torwico relating to the violation noted in November 1989. The Order required Torwico to submit a written closure plan for the seepage pit and assessed a $22,500 penalty for failure to take action following the November notice. The Order also stated: "No obligations imposed [by this order] . . . are intended to constitute a debt, damage claim, penalty or other civil action which should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment."

Torwico and NJDEPE filed cross-motions for summary judgment before the bankruptcy court, with Torwico seeking to avoid its obligations to the state by claiming that they were claims barred by the absence of a filing prior to the bar date. The court agreed with Torwico and released the company from its obligations because NJDEPE had failed to timely

file a proof of claim. On appeal, the district court reversed. Torwico then filed this appeal.[1]

II.

A.

Because debts are dischargeable in Chapter 11, critical to the resolution of this case is whether Torwico's obligations constitute a "debt" under the bankruptcy code. A "debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1988). A "claim," in turn, is defined in part as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

---

[1] A final order reversing the decision of the bankruptcy court was issued by the district court on December 14, 1992. We therefore have jurisdiction under 28 U.S.C. § 1291. The district court properly exercised jurisdiction over this case pursuant to 28 U.S.C. § 158(a), and the bankruptcy court had jurisdiction over this chapter 11 bankruptcy pursuant to 28 U.S.C. § 157.

Because the issues raised here are questions of law, and because the district court's decision was made in a summary judgment context, our review is plenary.

11 U.S.C. § 101(5) (1988). Torwico contends that this broad definition clearly encompasses its obligations to the state under the administrative order and the state statute pursuant to which it was issued. NJDEPE, on the other hand, contends that it has no "right to payment"; rather, it has only the right to enforce laws requiring Torwico to clean up the hazardous wastes it is responsible for under state law.

Both sides agree that a proper interpretation of the Supreme Court decision in *Ohio v. Kovacs*, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985) is instrumental in resolving this case. In *Kovacs*, the state of Ohio obtained an injunction against *Kovacs* requiring him, *inter alia*, to clean up hazardous wastes on his property. When *Kovacs* failed to comply, the state obtained a court order appointing a receiver for the property. The receiver was directed to take possession of the property, as well as other assets, and complete the cleanup. After the receiver was appointed, but before he completed the cleanup, *Kovacs* filed for personal bankruptcy. The state, seeking to obtain some of *Kovacs'* post-bankruptcy income for use in paying for the cleanup, argued that *Kovacs*'s obligation to clean up the property under the state's environmental laws was not a "debt" (or, in other words, that the state had no "claim") and was not dischargeable. The Supreme Court disagreed.

After looking at the definition of "claim" and the legislative history, the Court concluded that the state had a "right to payment" and thus possessed a "claim." It noted that *Kovacs* no longer had possession of the site nor control over the cleanup; all the state sought from *Kovacs* was money to fund the cleanup. In essence, the Court found that *Kovacs*'s obligation had been reduced to a monetary claim. In reaching its decision, the Court noted a number of issues it was not deciding:

> We do not address what the legal consequences would have been had *Kovacs* taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee. . . . We do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy; we here address . . . only the affirmative duty to clean up the site and the duty to pay money to that end. . . . We do not question that anyone in possession of the site . . . must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State or refuse to remove the source of such conditions.

Id. at 284-85.

Torwico contends that *Kovacs* applies here: *Torwico's* "affirmative duty to clean up the site and the duty to pay money to that end" is a claim. In addition, Torwico is no longer in possession of the site and thus, the Court's admonition that parties in possession "must comply with the environmental laws of the State" and cannot "refuse to remove" hazardous wastes does not apply to it. NJDEPE contends that *Kovacs* is inapplicable here because it does not seek a monetary judgment, but rather seeks to remedy ongoing pollution by forcing Torwico to clean up the site.

B.

Considerable insight into the issue presented here may be gleaned from two recent appellate cases that have dealt with similar questions. In *In re CMC Heartland Partners*,

966 F.2d 1143 (7th Cir. 1992), the debtor owned a hazardous waste site and went through bankruptcy under the Bankruptcy Act of 1898. Subsequently, EPA issued an order pursuant to CERCLA § 106, 42 U.S.C. § 9606, to the debtor, who still owned the site, requiring removal and remediation activity. The Seventh Circuit Court of Appeals held that the order, which was based on ownership of the land, survived reorganization. The court noted that "[t]o the extent [the relevant federal statutory sections] require a person to pay money today because of acts before or during the reorganization proceedings, CERCLA creates a 'claim' in bankruptcy." *Id.* at 1146. However, by authorizing cleanup orders to current owners, CERCLA § 106 creates a claim "running with the land," and a "statutory obligation attached to current ownership of the land survives bankruptcy." *Id.* at 1147. Thus, the court found in favor of EPA, but warned that EPA must show under § 106 that the releases were "threatened or ongoing"; otherwise, one might conclude that EPA merely "repackaged a forfeited claim for damages." *Id.*

In *In re Chateaugay*, 944 F.2d 997 (2d Cir. 1991), the court faced the issue of what constituted a claim in the context of the bankruptcy of LTV, an entity that owned and operated literally dozens of hazardous waste sites. The Second Circuit held that the EPA's costs of responding to a release of hazardous waste, even if not yet incurred at the time of bankruptcy, involved claims; thus, EPA was forced to file a proof of claim with respect to these costs and stand in line with the other creditors. As to injunctions requiring the debtor to clean up a waste site, the court made the following distinction:

> EPA is entitled to seek payment if it elects to incur cleanup costs itself, but it has no authority to accept

> a payment from a responsible party as an alternative to continued pollution. Thus, a cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim. It is true that, if in lieu of such an order, EPA had undertaken the removal itself and sued for the response costs, its action would have both removed the accumulated waste and prevented continued pollution. But it is only the first attribute of the order that can be said to remedy a breach that gives rise to a right to payment. Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a 'claim.' But an order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a 'claim' if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.

Id. at 1008.[2]

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[2] The parties here also devote considerable attention to our decision in *Penn Terra Ltd. v. Dept. of Environmental Resources*, 733 F.2d 267 (3d Cir. 1984). In this pre-*Kovacs* case, the court examined whether attempts by the state to enforce a pre-bankruptcy injunction requiring Penn Terra to undertake certain cleanup actions was barred by the automatic stay provisions of § 362. The court concluded that because the injunction was

(continued...)

C.

We find *CMC* and *Chateaugay* to be both persuasive and consistent.[3] Applying the precepts outlined in those cases to the situation here present leads us to conclude that Torwico's obligations under the administrative order do not constitute a claim.

As *Kovacs* noted, a debtor cannot maintain an ongoing nuisance in direct violation of state environmental laws. The state can exercise its regulatory powers and force compliance with its laws, even if the debtor must expend money to comply. Under *Kovacs*, what the state cannot do is force the debtor to pay money to the state; at that point, the state is no longer acting in its role as regulator, it is acting as a creditor.[4]

Here it is clear that the state demanded not that Torwico pay money over to the state, but rather that it take action to

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[2] (...continued)
an exercise of state regulatory power and was not an action for a "money judgment," the state could enforce the injunction. Because this case involved the automatic stay provision of the Bankruptcy Code and the court expressly declined to discuss whether the injunction constituted a "claim" or "debt," *see id.* at 277 n.11, this case is of only marginal relevance in deciding the issue currently before us.

[3] We note that neither NJDEPE nor Torwico appears to challenge the correctness of *CMC* or *Chateaugay* but rather, they dispute the proper application of those decisions to the current situation.

[4] Were we to adopt the bankruptcy court's position that any order requiring the debtor to expend money creates a dischargeable claim, it is unlikely that the state could effectively enforce its laws: virtually all enforcement actions impose some cost on the violator.

ameliorate ongoing hazard.[5] This is not the end of the inquiry, however. As noted in *Kovacs*, even if an injunction does not facially require payment of money, it still may present a "claim." 469 U.S. at 274. *Chateaugay* and *CMC* also both suggest that, at least in some circumstances, an injunction that requires a cleanup may still be considered a "claim." *CMC* held that the CERCLA § 106 order there involved must be in response to an ongoing and continuing threat, and not merely the repackaging of a forfeited claim for damages. 966 F.2d at 1146-47. *Chateaugay* states that where an order imposes "obligations distinct from any obligation to stop or ameliorate ongoing pollution," the order presents a claim if the government could have done the work itself and then sought reimbursement; under such circumstances there is a "breach of an obligation that gives rise to a right of payment." 944 F.2d at 1008.

The state here found that the seepage pit was a continuing problem that was leaking hazardous material into the surrounding environment. Thus, the state is not asserting a "repackaged claim for damages"; rather, there is an ongoing and continuing threat and, in the words of *Chateaugay*, an obligation on the part of the debtor "to ameliorat[e] ongoing pollution emanating from [accumulated] wastes." *Chateaugay*, 944 F.2d at 1008. The state has no "right to payment" here. What it has is a right to force the debtor to comply with applicable environmental laws by remedying an existing hazard.

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[5] The Order requires Torwico to submit "a written closure plan . . . for closure of the seepage pit." App. at 210. An affidavit from an employee of NJDEPE discusses in detail the findings of contamination and the fact that wastes are migrating into the surrounding environment. *See* App. at 219-31 ("It is safe to assume, at the concentrations detected at the property boundary, that the contamination has migrated offsite.").

The single fact which Torwico relies on most heavily is that it is no longer in possession of the site, and has not been in possession for several years. Thus, Torwico argues that it is not maintaining a nuisance or participating in an ongoing release of hazardous substances into the environment. It notes that a prime factor in *Kovacs* was that the debtor was no longer in possession of the property and that a receiver was in possession and was conducting the cleanup. Similarly, unlike the debtor in *Chateaugay*, Torwico is not, in its view, "continuing to pollute" here. Finally, Torwico notes that *CMC* found a "statutory obligation running with the land"; Torwico no longer owns or occupies the land here.

We do not find Torwico's suggested distinction persuasive. Unlike the debtor in *Kovacs*, Torwico can (and in the state's view, must) conduct the cleanup: it has access to the site and the state has not, apparently, performed any cleanup on its own. Under New Jersey law, Torwico is a generator of hazardous waste and as such has an ongoing responsibility for the wastes it disposes. Even though Torwico no longer possesses the property, it is still, allegedly, Torwico's wastes that are presenting a continuing environmental hazard. Under New Jersey law, Torwico is accordingly still responsible for the nuisance and cannot avoid compliance with the environmental laws. *Kovacs*, *CMC*, and *Chateaugay* all suggest that Torwico must remedy the situation; the obligations under the Order are not a "claim."[6]

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[6] The parties dispute whether if the state has an "alternate payment remedy" the order becomes a "claim." Here, it is undisputed that the order was issued under statutory sections which do not allow the state to perform the cleanup and then sue for reimbursement of its costs. That authority may exist under other potentially relevant statutes for the state to perform the cleanup and seek reimbursement for its costs is irrelevant--

(continued...)

D.

Unlike *Kovacs*, the state in this case neither seeks money nor has a right to payment under the statutory authority asserted or the Order imposed; the state seeks compliance with its laws through a cleanup of a current hazardous situation. In the words of *Chateaugay*, "there is no option to accept payment in lieu of continued pollution," and there is an order intended to "ameliorate continued pollution"; thus, the Order "is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a 'claim.'" 944 F.2d at 1008. Under the circumstances here present, Torwico's obligations do not run with the land as did the debtor's in *CMC*; however, they run with the waste. To the extent that Torwico's waste poses a continuing hazard, Torwico is responsible for remedying the problem regardless of where the waste might be.[7] As in *CMC*, the release here is "threatened and ongoing"; as in *CMC*, this is

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[6] (...continued)
-much as it was irrelevant in *CMC* and *Chateaugay*. The *Chateaugay* court noted that "to the extent that [an order] imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, [it] is a 'claim' if the creditor obtaining the order had the option . . . to do the cleanup work itself and sue for response costs." *Chateaugay*, 944 F.2d at 1008. Here, Torwico's obligation was an obligation to ameliorate ongoing pollution; it had no option to pay for the right to allow its wastes to continue to seep into the environment. That the state may have had alternative means at its disposal to end the ongoing threat does not convert its statutory authority into a "right to payment."

[7] *CMC* held that a "statutory obligation attached to current ownership of the land survives bankruptcy." 966 F.2d at 1147. Similarly, a statutory obligation attached to hazardous waste (i.e. to make sure it does no damage) also survives bankruptcy.

not a "repackaging [of] a forfeited claim for damages" (966 F.2d at 1147) for past conduct, but rather an attempt to prevent additional future damage.

IV.

In conclusion, we hold that the state's attempt in this case to force a party to clean up a waste site which poses an ongoing hazard is not a "claim" as defined by the Bankruptcy Code. This is not a situation where the state is attempting to get money from the debtor but rather, it is an exercise of the state's inherent regulatory and police powers. We will therefore affirm the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5021

IN RE TORWICO ELECTRONICS, INC.,
Debtor,

TORWICO ELECTRONICS, INC.,
Appellant

v.

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Appellee

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 92-01828)

STAPLETON, HUTCHINSON AND ROTH, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on August 3, 1993.

On consideration whereof, if is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 14, 1992, be, and the same is

hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

[s] P. Douglas Sisk
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 92-1828 (AET)

TORWICO ELECTRONICS, INC.,
Plaintiff/Appellee
v.
STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION AND ENERGY,
Defendant/Appellant

On Appeal From the United States Bankruptcy
Court For the District of New Jersey

Decided December 8, 1992
Before: Anne E. Thompson, *District Judge*

MEMORANDUM AND ORDER

ANNE E. THOMPSON, *District Judge*.

This matter is before the Court on an appeal by the State of New Jersey, Department of Environmental Protection and Energy ("DEPE") from the Bankruptcy Court's judgment, filed September 20, 1991, in favor of Torwico Electronics, Inc. ("Torwico"), a manufacturer of electronic transformers. DEPE is appealing a final judgment of the Bankruptcy Court, and this Court has jurisdiction pursuant to 28 U.S.C.A.

§ 158(a) (West 1992). The Bankruptcy Court's legal conclusions are subject to plenary review, and its factual findings are examined under a clearly erroneous standard. *See* Fed. R. B.R. P. 8013; *J.P. Fyfe, Inc. v. Bradco Supply Corp.*, 891 F.2d 66, 69 (3d Cir. 1989) (citations omitted).

Background

The parties' dispute arises from an illegal seepage pit located on property that Torwico had leased from George Allen Associates ("GAA"). Torwico relocated after the lease ended in September 1985; however, it subsequently entered into an agreement with GAA to share certain costs related to New Jersey's Environmental Cleanup Responsibility Act ("ECRA"). *See* N.J. Stat. Ann. §§ 13:1K-6 to -14 (West 1991). On August 4, 1989, Torwico filed its Chapter 11 bankruptcy petition. In October 1989, the Bankruptcy Court issued an order declaring that January 2, 1990 was the last day on which a party could file a proof of claim or interest. DEPE, however, asserts that it did not receive notice of Torwico's bankruptcy filing.

In November 1989, DEPE inspected Torwico's former site and discovered the seepage pit containing hazardous wastes. The contamination, moreover, had migrated from the pit into off-site ground waters. Torwico denies that it used or even knew of the seepage pit during its operations on the former site. In late March 1990, Torwico filed an adversary proceeding seeking to preclude DEPE from imposing any liability or enforcing any obligation for environmental cleanup. Torwico reasoned that such a liability or obligation would constitute a claim under Chapter 11 of the Bankruptcy Code, and that DEPE was barred from pursuing any claims because of its failure to file a timely proof of claim. In response, DEPE argued that its efforts to

ensure that Torwico complies with environmental laws constitute an exercise of the state's police power and would not be dischargeable in bankruptcy.

In early April 1990, DEPE issued an Administrative Order and Notice of Civil Administrative Penalty Assessment to Torwico which required *inter alia* that Torwico develop a closure plan for the seepage pit. In August 1990, DEPE issued a Notice of Violation of ECRA to Torwico and GAA. In November 1990, Torwico filed a motion with the Bankruptcy Court for summary judgment and injunctive relief, and DEPE cross-moved for summary judgment. Following oral argument on January 14, 1991, and supplemental briefing and reargument on April 1, 1991, the Bankruptcy Court issued its opinion and order. *See In re Torwico Elecs., Inc.*, 131 B.R. 561 (Bankr. D.N.J. 1991).

The Bankruptcy Court held that the Torwico's cleanup obligation was an unsecured claim. *Id.* at 572; *see also* 11 U.S.C.A. § 101(5) (West Supp. 1992). It reasoned that "where a debtor in bankruptcy cannot clean up environmental contamination . . . without paying money, the obligation to clean up pursuant to an injunction is a debt which is dischargeable in bankruptcy." 131 B.R. at 569. Following this conclusion, the Bankruptcy Court held that the DEPE's claim was time-barred and that the sections of ECRA which "purport to dictate the treatment of cleanup obligations in bankruptcy" are void under the Supremacy Clause. *Id.* at 573, 576; *see also* N.J. Stat. Ann. § 13:1K-12 (West 1991) ("No obligations imposed by this act shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding.").

Discussion

In *Ohio v. Kovacs*, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985), the Supreme Court affirmed the Sixth Circuit's conclusion that the debtor's "cleanup duty had been reduced to a monetary obligation," and constituted a claim under the Bankruptcy Code. *Id.* at 282, 105 S. Ct. at 709. In *Kovacs*, however, the state's attorney conceded in oral argument that the only performance sought from the debtor was the payment of money. *See id.* at 283. Thus, *Kovacs* does not mandate that all prepetition cleanup obligations are equivalent to monetary obligations. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 106 S. Ct. 755 (1986), 88 L. Ed. 2d 859, the Supreme Court held that a bankruptcy trustee cannot abandon property in contravention of state environmental statutes and regulations. *Id.* at 507. Although *Midlantic* specifically addressed the issue of a bankruptcy trustee's abandonment power, it clarified that: "Congress did not intend for the Bankruptcy Code to pre-empt all state laws." *Id.* at 505, 106 S. Ct. at 761.

In *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267 (3d Cir. 1984), the Third Circuit interpreted sections 362(b)(4) & (5) of the Bankruptcy Code,[1] and addressed the issue of whether the actions of the Pennsylvania Department of Environmental Resources ("DER") were an attempt to enforce a money judgment. *Id.*

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[1] Section 362(b)(4) provides that no bankruptcy stay applies to the "commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C.A. 362(b)(4) (West 1979). Section 362(b)(5) provides that the stay applies to money judgments even if in furtherance of the state's regulatory power. *See id.* § 362(b)(5).

at 272. The *Penn Terra* court concluded that "the suit brought by DER to compel Penn Terra to remedy environmental hazards was properly brought as an equitable action to prevent future harm, and did not constitute an action to enforce a money judgment." *See id.* at 278. Although the bankruptcy stay provisions contain a specific exception for the exercise of police or regulatory power, and the provisions defining bankruptcy claims do not, *Penn Terra* recognizes that requiring a debtor "to rectify harmful environmental hazards" entails the exercise of state regulatory powers. *Id.* at 274.

In *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), the Second Circuit recognized the difficulty in classifying a debtor's obligation to clean up a toxic waste site that continues to leach hazardous substances into nearby water supplies. *See id.* at 1007. This obligation contains two elements: (1) to stop the on-going pollution, and (2) to cleanup the toxic substances which may have been deposited before the debtor filed for bankruptcy. The *Chateaugay* court concluded that: "[A] cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating on-going pollution emanating from such wastes is not a dischargeable claim." *Id.* at 1008.

In this case, the DEPE has no alternative payment remedy under ECRA and is attempting to remedy both past and ongoing pollution. In light of the foregoing case law, the Court concludes that Torwico's cleanup obligation under ECRA is not a dischargeable unsecured claim. The Court, therefore, need not reach the issue of whether the DEPE's purported claim would be time-barred. Similarly, since this conclusion eliminates the alleged conflict between ECRA and the Bankruptcy Code, the Supremacy Clause issue does not arise. *See Perez v. Campbell*, 402 U.S. 637, 644, 91 S. Ct. 1704, 1708, 29 L. Ed. 2d 233 (1971).

For all these reasons, it is on this 8th day of December 1992;

ORDERED that the Department of Environmental Protection and Energy's appeal of the Bankruptcy Court's decision granting Torwico Electronics, Inc. an injunction prohibiting the State from enforcing certain environmental laws be and hereby is granted, and it is further;

ORDERED that the Bankruptcy Court's ruling that Torwico Electronics, Inc.'s cleanup obligation is an unsecured claim be and hereby is reversed, and that the remainder of the Bankruptcy Court's decision be and hereby is vacated.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE TORWICO ELECTRONICS, INC.,
Debtor,

TORWICO ELECTRONICS, INC.,
Plaintiff,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant.

Bankruptcy No. 87-06071
Adv. No. 90-3116 TS

Sept. 6, 1991
As Amended Sept. 27, 1991

MEMORANDUM OPINION

STEPHEN A. STRIPP, *Bankruptcy Judge*

This is an opinion on a motion and cross-motion for summary judgment in this adversary proceeding. The Debtor applies for a declaratory judgment that any obligation which it may have to the State of New Jersey under environmental laws to clean up contamination at the Debtor's former place of business is an unsecured claim under title 11, United States Code (the Bankruptcy Code), and that the State is now

barred from collecting because of failure to file a proof of claim within the time required by the Bankruptcy Rules. The Debtor also applies for an injunction permanently restraining defendant State of New Jersey, Department of Environmental Protection ("the DEP") from seeking to enforce such claims in any judicial or administrative proceeding. The DEP applies for a declaratory judgment that the Debtor's obligations to the State are not claims, and in the alternative, that any such claims are not time-barred. This court has jurisdiction under 28 U.S.C. §§ 1334(a) and 151. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (O). This shall constitute the court's findings of fact and conclusions of law.

I.
FINDINGS OF FACT

The material facts are undisputed. The Debtor is in the business of manufacturing electronic transformers. Its present place of business is 410 Oberlin Avenue, Lakewood, New Jersey. However, until September, 1985 the Debtor's place of business was located at the corner of New Jersey Route 70 and New Hampshire Avenue in Lakewood ("the property"). The Debtor never owned this property, but, in fact, leased the property from the present owner, George Allen Associates ("GAA"). The Debtor's lease terminated and it moved from the property as of September 3, 1985. The Debtor has not had possession of or control over the property since then.

At some point after the Debtor moved from the property, the Debtor and GAA entered into an agreement to share

certain ECRA related costs.[1] The Debtor and GAA took certain steps to clean up contamination on the property.[2] A dispute then arose over a waste solvent seepage pit which GAA discovered during its cleanup. This pit was an illegal facility.[3] Torwico denies that it ever used the seepage pit and that it was even aware of its existence.[4] Remediation of soil contamination was completed to the DEP's satisfaction. However, there is extensive ground water contamination which apparently originated from the seepage pit and which has migrated off the property. The DEP believes that the ground water contamination poses a potential threat to public health.

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[1] Certification of Robert Savino, President of the Debtor, dated November 20, 1990, ¶ 3.

[2] Affidavit of Michael J. McCann, DEP Case Manager, filed March 8, 1991.

[3] *Id.*, para. 29.

[4] Savino Certification, *supra*. Although it is not part of the record in this adversary proceeding, it is part of the record in the Debtor's bankruptcy case that in October, 1986 GAA filed suit against the Debtor in the Superior Court of New Jersey for damages arising from alleged breach of lease provisions requiring the Debtor to comply with ECRA. The Debtor filed an answer denying liability, a counterclaim, and a third-party complaint. The third-party defendant, in turn, filed fourth-party complaints. The DEP is not a party to that case. After the Debtor filed its bankruptcy petition it removed the state court case to this court. However, this court later remanded the case to the state court. This court has not been informed that there has been any adjudication yet in that case of the question of liability as between the Debtor and GAA for environmental cleanup costs. Since GAA is not a party to this adversary proceeding, the judgment to be entered herein is presumptively not binding upon it.

On August 4, 1989, the Debtor filed a petition for reorganization under chapter 11 of the Bankruptcy Code. It remains a debtor in possession. It scheduled the DEP and the Attorney General of New Jersey on Schedule A-3, which is for unsecured creditors, as holding disputed claims against the Debtor.[5] On October 4, 1989 the court issued an Order for Meeting of Creditors, Combined with Notice Thereof and of Automatic Stay, which is a standard order issued in every bankruptcy case. The order issued in the Debtor's case stated in pertinent part as follows:

> ANY CREDITOR OR EQUITY SECURITY HOLDER WHOSE CLAIM OR INTEREST IS NOT SCHEDULED OR SCHEDULED AS DISPUTED, CONTINGENT OR UNLIQUIDATED SHALL FILE A PROOF OF CLAIM OR INTEREST ON OR BEFORE JANUARY 2, 1990 OR UNLESS OTHERWISE MODIFIED BY THE COURT.

This order was mailed by the court to each scheduled creditor. It stated whether each creditor's claim was scheduled as disputed, and each creditor was thereby informed as to whether it was necessary to file a proof of claim. Such filing is necessary to preserve the creditor's right to receive payment in the case; if a proof of claim is timely filed, a hearing is eventually scheduled to adjudicate the debtor's objection to such claim. Copies of the order in question were served by mail upon the Attorney General of the State of New Jersey and upon the DEP on October 4, 1989. The orders were mailed to the correct addresses, and were not

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[5] Bankruptcy Rule 1007(b)(1) requires a debtor to file schedules of its assets and liabilities on certain official forms.

returned as undelivered. The Attorney General and the DEP, however, deny that they were served with the order, stating that neither of them has any record of it.

The summons and complaint commencing this adversary proceeding were served upon the DEP on or about April 2, 1990. On April 9, 1990 the DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment to the Debtor ("the Administrative Order").[6] In substance, it determines that the Debtor disposed of hazardous wastes in the seepage pit in violation of the Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.* and regulations thereunder. The Administrative Order directs the Debtor to submit a written plan to the DEP for closure of the seepage pit within fifteen days. It also assesses a civil administrative penalty of $22,500 against the Debtor, and states that payment is due when the Order becomes final. It also states that the Order is binding upon any bankruptcy trustee, and that

> No obligations imposed by this Administrative Order and Notice of Civil Administrative Penalty Assessment (with the exception of (the $22,500 penalty]) are intended to constitute a debt, damage, claim, penalty or other civil action, which should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment.

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[6] *See* Exhibit D to Savino Certification, *supra*.

II.
STANDARDS GOVERNING SUMMARY JUDGMENT

These motions are governed procedurally by Bankruptcy Rule 7056, which incorporates by reference Rule 56 of the Federal Rules of Civil Procedure, dealing with summary judgment. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c). *In Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), 91 L. Ed. 2d 265, the Supreme Court stated that:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed.R-.Civ.P. 1.

A party opposing a motion for summary judgment must

> . . . do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'

Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348 (1986), 89 L. Ed. 2d 538.

As the cross-motions for summary judgment reflect, the parties agree that there are no genuine issues of material facts, *i.e.* facts which are essential to the determination of this action. The material facts are as stated in Section I above, and the disputes are as to issues of law.

III.

BEFORE FUNDS ARE EXPENDED BY A BANKRUPTCY ESTATE FOR ANY REASON, A DETERMINATION MUST BE MADE THAT THE EXPENDITURE IS AUTHORIZED UNDER THE CLASSIFICATION AND DISTRIBUTION PROVISIONS OF THE BANKRUPTCY CODE.

To place the issues which follow in their proper context, it is first necessary to briefly consider certain fundamental aspects of bankruptcy law.

The filing of a bankruptcy petition creates an estate which consists of substantially all legal and equitable interests of the debtor in property as of the commencement of the case. Code § 541. The Bankruptcy Code includes a system of provisions for classification of claims against the debtor's property, determination of priorities, and conditions to payment. Although there is a great variety of obligations under nonbankruptcy law requiring payment of money, the Bankruptcy Code provides that all such obligations must be classified within a small handful of categories. This system of classification is an integral part of bankruptcy law, because in the vast majority of bankruptcy cases, there are insufficient assets to satisfy all claims against the debtor in full. Because this creates competition for a debtor's assets, the Bankruptcy Code also includes a system of priorities.

There are only five basic categories of claims in the Bankruptcy Code against a debtor's assets. In order of priority, those categories are as follows:

1. *Secured claims*. These are claims secured by liens on a debtor's assets. A lien is essentially a right to resort to a particular asset for payment before any other creditor can resort to it. Under Bankruptcy Code § 506, a claim is secured to the extent of the value of the collateral, and

unsecured to the extent of any deficiency. Security interests, which essentially consist of contractual liens on real or personal property, are the most common form of lien. A security interest is property which is protected by the Takings Clause of the Fifth Amendment to the United States Constitution, which provides that no private property shall be taken for public use without just compensation. *United States v. Security Industrial Bank*, 459 U.S. 70, 103 S. Ct. 407 (1982), 74 L. Ed. 2d 235, Secured claims therefore have the highest level of priority in bankruptcy cases. Code § 361 and other sections are designed to prevent involuntary reduction in value of secured claims, which would violate the Takings Clause.

2. *Administrative expenses.* These are the actual, necessary costs and expenses of preserving the bankruptcy estate, and related expenses. Code § 503(b). After secured claims, administrative expenses have the second highest level of priority. Code § 507(a)(1). That essentially reflects the practical reality that if bankruptcy estates are to be administered, those who render such services require assurance that they will meet a better fate than other creditors of the debtor (although it often happens that administrative expenses also are not paid in full.)

3. *Priority claims.* Administrative expenses are a type of "priority" claim. Code § 507(a)(1). The term "priority claim", however, is generally used in this State as a term of art to refer to all of the types of claims defined in Code § 507(a)(2) through (8) which, for policy reasons, Congress has determined shall receive preferred treatment in distributions of a debtor's property. Tax claims generally fall under Code § 507(a)(7) (although they may also be secured claims under applicable nonbankruptcy law, or administrative expenses if they arise postpetition). Claims based upon

commitments to the Federal Deposit Insurance Corporation, Resolution Trust Corporation and related entities to maintain the capital of an insured depository institution fall under Code § 507(a)(8). *These are the only types of obligations of a debtor to governmental units which are given priority by the Bankruptcy Code.*

4. *Unsecured claims*. These are all other legal obligations of the debtor requiring payment of money. Code § 101(5). The Bankruptcy Code generally defers to nonbankruptcy law to determine the creation of legal obligations which give rise to claims. *In re Meyertech*, 831 F.2d 410, 417 (3d Cir. 1987). Code § 502(b), however, does limit certain types of claims.

5. *Equity interests*. These are essentially the ownership interests, primarily those reflected in capital stock in the case of a corporate debtor. Code § 101(16).

Code § 1129 in chapter 11 cases and Code § 726 in chapter 7 cases require that all distributions of money or other property from a bankruptcy estate must follow this order of priority (except to the extent that a particular class consents to different treatment under a chapter 11 plan).

Two fundamental conclusions follow from the Bankruptcy Code provisions dealing with classification of obligations and distribution of property of the estate. First, *every type of obligation requiring payment of money from a bankruptcy estate falls within one of the foregoing five categories; the Bankruptcy Code recognizes no other categories (except for co-ownership interests of third parties)*. Second, *where there is a dispute about whether money should be paid from a bankruptcy estate to satisfy a legal obligation, the first phase of the analysis must be to determine the category to which the obligation belongs*. With this background, we can proceed

to determine the nature of the debtor's obligation to clean up its former property under the Bankruptcy Code, and the treatment to which it is entitled in this case.

IV.
THE DEBTOR'S CLEANUP OBLIGATION TO THE STATE IS AN UNSECURED CLAIM.

The DEP issued its Administrative Order under the Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.* ("the Solid Waste Act"), and regulations thereunder. Moreover, the DEP also alleges that the Debtor violated three other New Jersey environmental laws by the wrongful discharge of hazardous substances on the property: the Environmental Cleanup Responsibility Act, N.J.S.A. 13:1K-6 *et seq.* ("ECRA"); the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.* ("the Spill Act"); and the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 *et seq.* ("the Water Pollution Act"). The Debtor denies that it violated any of those laws. However, for purposes of these motions for summary judgment the Debtor argues essentially that even if it did violate those laws, any resulting obligations it may have to the State of New Jersey are debts which are dischargeable in bankruptcy. The DEP argues that such obligations are not debts, but rather are "regulatory obligations" which are not dischargeable. The first question then is as to the definitions of the terms "debt" and "claim" under the Bankruptcy Code.

Code § 101(5) states that

> "claim" means--
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;

> or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Code § 101(12) defines "debt" as "liability on a claim." Under Code § 101(10)(A), the term "creditor" means an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."[7] The legislative history expresses Congressional intent that "the terms debt and claim are coextensive: a creditor has a claim against the debtor; the debtor owes a debt to the creditor." 2nd Sess. 23 (1978); S. Rep. No. 95-589, 95th Cong., H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 310, 1978 U.S. Code Cong. & Admin. News 6267 (1977). Congress intended that these terms should be defined very broadly:

> By this broadest possible definition [of the term "claim"], and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

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[7] Code § 301 provides that in a voluntary bankruptcy case, the filing of the bankruptcy petition constitutes an order for relief under the chapter of the Bankruptcy Code under which the petition was filed.

S. Rep. No. 95-989, 95th Cong., 2d Sess. 21-22 (1978); H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 309, 1978 U.S. Code Cong. & Admin. News 6266 (1977).

In three recent cases, the United States Supreme Court has held that the term "claim" is to be defined as broadly as Congress intended. In *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990), the Supreme Court held that restitution obligations imposed as conditions of probation in state criminal actions are "debts" which are dischargeable under chapter 13 of the Bankruptcy Code. In so doing, the Court held that the fact that restitution orders are imposed for the benefit of the state as well as the victims makes no difference as to whether such obligations are "claims" in bankruptcy:

> But the language employed to define "claim" in § 101(4)(A) makes no reference to purpose. The plain meaning of "right to payment" is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation.

110 S. Ct. at 2131.

The Supreme Court reaffirmed this holding this year in *Johnson v. Home State Bank*, ____ U.S. ____, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991). The issue in *Johnson* was whether a debtor can include a mortgage lien in a chapter 13 bankruptcy reorganization plan once the personal obligation secured by the mortgaged property has been discharged in a chapter 7 proceeding. The Court held that in such a circumstance the mortgage lien remains a "claim" against the debtor that can be rescheduled under chapter 13. Code § 524(a)(1) provides that a bankruptcy discharge extinguishes "the personal liability of the debtor with respect to any debt," and the defendant argued that after such discharge, the obligation

secured by the remaining lien was no longer a "debt." The Court noted that Code § 102(2) establishes as a rule of construction that the phrase "'claim against the debtor' includes claim against property of the debtor." Hence, the fact that the defendant could still look to the debtor's real property as a source of payment meant that the defendant still had a "claim" against the debtor.

In both *Johnson* and *Davenport*, the Supreme Court relied on its holding in *Ohio v. Kovacs*, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985). In *Kovacs*, the State of Ohio obtained an injunction ordering William Kovacs to clean up a hazardous waste site. A receiver was subsequently appointed. Then Kovacs filed a bankruptcy petition. The Supreme Court stated that "[t]he question before us is whether in the circumstances present here, Kovacs' obligation under the injunction is a 'debt' or 'liability on a claim' subject to discharge under the Bankruptcy Code." *Id.* at 275, 105 S. Ct. at 706.

Kovacs was an officer and stockholder of a corporation which caused pollution in Ohio. The State obtained a consent judgment which required the corporation and Kovacs to cease polluting, to clean up the property, and to pay the State $75,000 in damages. When there was no compliance, Ohio appointed a receiver for Kovacs' assets to implement the judgment. When Kovacs filed a bankruptcy petition, Ohio sought a declaratory judgment that Kovacs' obligation under the injunction requiring cleanup was not a "debt." In a unanimous opinion, the Supreme Court held as follows:

> The State resorted to the courts to enforce its environmental laws against Kovacs and secured a negative order to cease polluting, an affirmative order to clean up the site, and an order to pay a sum of money to recompense the State for damage

> done to the fish population. Each order was one to remedy an alleged breach of Ohio law; and if *Kovacs'* obligation to pay $75,000 to the state is dischargeable in bankruptcy, which the State freely concedes, *it makes little sense to assert that because the cleanup order was entered to remedy a statutory violation, it cannot likewise constitute a claim for bankruptcy purposes. Id.* at 279, 105 S. Ct. at 708 [emphasis added].

The Court therefore held that the obligation of the debtor under the cleanup order was a "claim" which was dischargeable in bankruptcy.

In all three of these cases, the Supreme Court has held in no uncertain terms that any enforceable obligation to pay money is a "claim" of the obligee and a "debt" of the obligor under Code §§ 101(5) and (12), which can be discharged in bankruptcy. Moreover, the unanimous opinion of the Court in *Kovacs* is directly on point. In *Kovacs*, as in this case, the State was seeking to compel the debtor to pay money to clean up environmental contamination. In *Kovacs*, as in this case, there was no suggestion by the State that the debtor was personally capable of cleaning up the environmental damage which he may have caused. "In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne cleanup." *Id.* at 282.

The DEP argues that *Kovacs* is not controlling. It states that the *Kovacs* decision "is a very narrow one involving a money judgment and a chapter 7 individual debtor who had already been replaced with a receiver, by the state" before he filed his bankruptcy petition.[8] There is nothing in *Kovacs*,

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[8] DEP's brief dated December 6, 1990, page 12.

however, which suggests that its analysis of the terms "claim" and "debt" should be limited to chapter 7 cases or to cases involving individuals. Furthermore, Code 103(a) provides that chapter 1, which includes the definitions of "debt" and "claim" in Code § 101, applies in all cases under chapters 7, 11, 12 and 13.

It is true that the appointment of a receiver was relevant in *Kovacs*. Accordingly, the Court declined to "address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed. . . ." *Id.* at 284. Consequently, the opinion is not entirely clear as to what the Court would have held if there had not been a receiver. Certain inferences, however, can be drawn from a close reading. The Court noted that William Kovacs was not the only person whose assets were placed in receivership:

> *William Kovacs was the chief executive officer and stockholder of Chem-Dyne Corp., which with other business entities* operated an industrial and hazardous waste disposal site in Hamilton, Ohio. In 1976, *the State sued Kovacs and the business entities* in state court for polluting public waters, maintaining a nuisance, and causing fish kills, all in violation of state environmental laws. *In 1979, both in his individual capacity and on behalf of Chem-Dyne, Kovacs signed a stipulation and judgment* entry settling the lawsuit. Among other things, *the stipulation enjoined the defendants* from causing further pollution of the air or public waters, forbade bringing additional industrial wastes onto the site, *required the defendants to remove specified wastes from the property*, and ordered the payment of $75,000 to compensate the State for injury to wildlife.

> *Kovacs and the other defendants failed to comply with their obligations under the injunction.* The State then obtained the appointment in state court of a receiver, *who was directed to take possession of all property and other assets of Kovacs and the corporate defendants and to implement the judgment entry by cleaning up the Chem-Dyne site. The receiver took possession of the site* but had not completed his tasks when *Kovacs* filed a personal bankruptcy petition.

Id. at 276, 175 S. Ct. at 706 [emphasis added]. Thus, it was significant that Chem-Dyne and other business entities operated the site in question, that the injunction required all of the defendants to clean up the site, and that the receiver took possession of all assets of Kovacs *and the corporate defendants, including* the site. The Supreme Court analyzed the effect that this had on any ability which Kovacs may otherwise have had to effect the cleanup:

> . . . the State secured the appointment of a receiver, who was ordered to take possession of all of *Kovacs'* nonexempt assets as well as the assets of the corporate defendants and to comply with the injunction entered against *Kovacs*. As wise as this course may have been, it *dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property.* Furthermore, when the bankruptcy trustee sought to recover Kovacs' assets from the receiver, the latter sought an injunction against such action. Although Kovacs had been ordered to "cooperate" with the receiver, *he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes*

> *from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs.* At oral argument in this Court, the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money. Tr. of Oral Arg. 19-20. Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have been satisfied. *On the facts before it, and with the receiver in control of the site,* we cannot fault the Court of Appeals for concluding that the cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy.

Id. at 282-83, 105 S. Ct. at 709-10 [emphasis added].

It therefore appears that the receivership *raised a question as to whether Kovacs* could somehow have used the assets of the business entities to effectuate cleanup if he had not been precluded from doing so by the receivership. The opinion does not state what those assets were, and *the Court appears to have had a question as to whether such assets included equipment and other items which could have been used to clean up. Kovacs* was, however, ". . . disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property." *Id.* at 283, 105 S.Ct. at 710.

Since it was clear that as a result of the receivership the only way Kovacs could comply with the injunction would be to pay money, the injunction became a dischargeable monetary obligation. Quoting from the Court of Appeals, the Supreme Court stated:

> *"Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. * * * In reality the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne cleanup.*
> *"The impact of its attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs* cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligations properly imposed upon him by the State court except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance." *[In re Kovacs]* 717 F.2d [984] at 987-988 [6th Cir. 1983]. *As we understand it, the Court of Appeals held that in the circumstances the cleanup duty had been reduced to a monetary obligation. We do not disturb this judgment.*

Id. at 282 [emphasis added].

This court concludes from the foregoing that the holding in *Kovacs* is that where a debtor in bankruptcy cannot clean up environmental contamination himself or itself without paying money, the obligation to clean up pursuant to an injunction is a debt which is dischargeable in bankruptcy. Since the definitions of "claim" and "debt" are the same regardless of the chapter in which the case is pending or the nature of the debtor, this holding applies to corporate debtors as well.[9]

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[9] In some chapter 11 cases in which the debtor is reorganizing, the court must address the relationship between *Kovacs* and 28 U.S.C. § 959(b), (continued...)

The DEP argues that a different result is required by *Penn Terra Ltd. v. Dept. of Envtl. Resources*, 733 F.2d 267 (3d Cir. 1984). In that case, the debtor operated coal mines in Pennsylvania. That state's Department of Environmental Resources ("DER") entered into a consent order with the debtor which required it to take certain actions to correct violations of state environmental laws. The debtor did not comply with the consent order, ceased operations and filed a petition for liquidation under chapter 7 of the Bankruptcy Code. The debtor's remaining assets consisted of $13,500 which it had furnished to the DER as bonds for its obligations under the consent order, and $500 of other unidentified assets. The cost of cleanup was greatly in excess of the bonds.

After the bankruptcy petition, the DER brought an action in state court to compel the debtor to clean up. The state court granted injunctive relief requiring such cleanup. The debtor then filed an application to hold the DER in contempt for violating the automatic stay of Bankruptcy Code § 362(a). The DER argued that the state court proceedings and injunction fell within the exceptions to the automatic stay in Code §§ 362(b)(4) and (5) for certain actions by governmental units pursuant to their police or regulatory powers. The bankruptcy court enjoined the DER from enforcing the state court injunction on the grounds that the debtor did not have

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[9] (...continued)
which requires that a debtor in possession operate according to the valid laws of the state in which such property is situated. See this court's opinion in *In re Heldor Industries, Inc.*, 131 B.R. 578, rendered on the same date as this opinion. That section, however, is not applicable in this case because the debtor has not been in possession of the subject property since September 1985, almost four years before the filing of the bankruptcy petition.

sufficient funds to comply with it. The district court affirmed, but the Court of Appeals reversed. It held that the term "money judgment" in Code § 362(b)(5) is to be construed narrowly, so that enforcement of a cleanup order other than a money judgment could proceed without obtaining relief from the automatic stay.

Penn Terra was issued before the Supreme Court's decision in *Kovacs*. *Penn Terra* distinguished the Sixth Circuit's opinion in *Kovacs* in a footnote, stating simply that "since different sections of the Bankruptcy Code are at issue which involve different policies and considerations, we are not prepared to declare that our decision is in conflict" with the Sixth Circuit's decision in *Kovacs*. *Penn Terra*, *supra*, 733 F.2d at 277 n. 11. Similarly, in affirming the Sixth Circuit the Supreme Court distinguished *Penn Terra*:

> . . . in that case, [i.e. *Penn Terra*], there had been no appointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt. The automatic stay provision does not apply to suits to enforce the regulatory statutes of the State, *but the enforcement of such a judgment by seeking money from the bankrupt -- what the Court of Appeals for the Sixth Circuit concluded was involved in this case -- is another matter.*

Kovacs, *supra*, 469 U.S. at 283 n. 11 [emphasis added]. Thus, the Supreme Court interpreted *Penn Terra* as a case in which the state was not seeking money from the debtor. The court makes it clear that if the DER had been seeking money from the debtor, the automatic stay would have barred such an action.

This renders the relationship between *Kovacs* and *Penn Terra* unclear at first blush. The question is, if a cleanup

order can only be implemented by the debtor paying money, does it make any difference for purposes of classification of that obligation under the Code whether the debtor pays a state-appointed receiver or a cleanup specialist to fulfill the obligation? The DEP has consistently taken the position in this court that *Kovacs* only applies in cases in which state-appointed receivers spend the debtor's money to clean up (which is rare), and that *Penn Terra* is the general rule, requiring the debtor to employ and pay a private cleanup specialist under Code § 362(b)(4) and (5). The DEP argues that the cleanup obligation is an unsecured claim only if a state-appointed receiver has seized the debtor's assets, and that the obligation has some higher priority if there has been no such seizure. However, there is nothing in *Kovacs* or the Code to suggest that a cleanup obligation should receive preferred treatment in bankruptcy if the debtor spends the money to effect cleanup, but not if the state seizes and spends the debtor's money. Such a distinction has no sound basis in law or logic.

This court, therefore, believes that the DEP has distorted the relationship between these cases. In a unanimous opinion, the Supreme Court held in *Kovacs* that where the debtor cannot perform a cleanup without payment of money, a cleanup order is a monetary obligation which is dischargeable in bankruptcy. *Id.* at 283. The Supreme Court also concluded that by seeking to compel payment, ". . . the State seeks to enforce his cleanup obligation by a *money judgment*." *Id.* at 283 [emphasis added]. Comparison of the cases reveals that the Supreme Court's definition of "money judgment" in *Kovacs* is much broader than the Third Circuit's definition in *Penn Terra*. In *Penn Terra*, the Third Circuit held that "a money judgment is an order entered by the court or by the clerk, after a verdict has been rendered for plaintiff, which adjudges that the defendant shall pay a

sum of money to the plaintiff." *Penn Terra*, *supra*, 733 F.2d at 275. It further held that "the adjudication of liability for a sum certain [is] an essential element of a money judgment." *Id.* The Third Circuit ascertained that "the definition of 'money judgment' implied in [the Sixth Circuit's opinion in] *Kovacs* and adopted by the bankruptcy court is unduly broad." *Id.* 469 U.S. at 277. The Third Circuit added the following comment regarding the Sixth Circuit's definition of "money judgment" in *Kovacs*:

> Nor are we prepared to predict that the Sixth Circuit, if confronted with the issue that is presented in this case, would hold that the commonwealth was *enforcing a money judgment by requiring compliance with an environmental injunction. We would disagree with such a result if it did so*, for the reasons we have expressed in text. (*Id.* at 275 n. 11 emphasis added).

After *Penn Terra* was written, however, the Supreme Court affirmed and adopted *the Sixth Circuit's definition of "money judgment" in Kovacs*. The cleanup order at issue in *Kovacs* was not "an adjudication of liability for a sum certain," and it therefore did not meet *Penn Terra*'s definition of "money judgment." Furthermore, the Supreme Court held that "it makes little sense to assert that because the cleanup order was entered to remedy a statutory violation, it cannot likewise constitute a claim for bankruptcy purposes." *Kovacs*, *supra*, 469 U.S. at 279. Because Ohio sought payment of money to effectuate a cleanup, "the cleanup order had been converted into an obligation to pay money. . . ." *Id.* at 283, 105 S. Ct. at 710. That obligation had become a money judgment: ". . . the State seeks to enforce his cleanup obligation by a money judgment." *Id.* at 285, 105 S. Ct. at 711.

In *Kovacs*, the Supreme Court distinguished *Penn Terra*'s holding that the automatic stay does not apply to suits to enforce state regulatory statutes including the entry of money judgments under Code § 362(b)(5). *However, the Supreme Court clearly defined "money judgment" more broadly than the Third Circuit did in Penn Terra.* Although *Penn Terra* still stands for the proposition that a state can enforce a cleanup order against a bankruptcy estate under Code § 362(b)(5) without obtaining relief from the automatic stay, *Kovacs* now defines "money judgment." Thus, if a cleanup order entered under Code § 362(b)(5) requires that the debtor spend money, a determination must be made as to whether the cleanup order is a "money judgment" under the *Kovacs* definition.[10]

The significance of the definition of "money judgment," of course, is that if an obligation is not a money judgment, the state is not automatically stayed by Code § 362(a) from ordering a debtor to fulfill the obligation. A money judgment, however, is only a form of claim. Where, as in *Kovacs*, a claim is a general unsecured claim, it is not entitled to any better treatment under the Bankruptcy Code than other claims of the same level of priority. *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985). The Third Circuit noted further that "*Penn Terra* does not deal with the priority to be afforded to a claim against the estate for the cost of an environmental cleanup."

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[10] The debtor had no money to spend in *Penn Terra*, the case was in chapter 7, and there were presumably no further operations. What, then, did the DER accomplish in *Penn Terra*? For one thing, since the Third Circuit required that the automatic stay be vacated, the DER -- which was a secured creditor to the extent of $13,500, in bonds -- presumably applied the bonds to payment for cleanup. However, since there were no other assets, the cleanup order was meaningless beyond that.

Id.[11] If the state can compel satisfaction by a bankruptcy estate of cleanup obligations which are unsecured claims, the state can effectively overrule the Bankruptcy Code system of classification and payment of obligations by designating an obligation underlying an unsecured claim as "regulatory" in nature. Since the Bankruptcy Code does not afford any priority to environmental cleanup obligations, permitting the state to effectively remove such obligations from the Code

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[11] Environmental cleanup obligations can have a priority higher than that of unsecured claims under certain circumstances. Such obligations can be secured by statutory liens. *Kovacs*, *supra*, 469 U.S. at 285-86 (O'Connor, J., concurring). *see also* the Spill Act, N.J.S.A. 58:10-23.1-1f(f), and Comment, "State 'Superlien' Statutes: An attempt to Resolve the Conflict between the Bankruptcy Code and Environmental Law," 59 Temp. L. Q. 981 (1986). In addition, the cost of cleaning up any contamination which occurs postpetition will be an administrative expense under Code § 503(b). *In re Pierce Coal and Const., Inc.*, 65 B.R. 521 (Bkrtcy. N.D.W.Va. 1986). *see also In re United Trucking Service, Inc.*, 851 F.2d 159 (6th Cir. 1988). *But see In re T. P. Long Chemical, Inc.*, 45 B.R. 278 (Bkrtcy. N.D.Ohio 1985), holding that the cost of cleaning up prepetition contamination is also to be treated as an administrative expense. For the reasons set forth in this opinion, this court disagrees with the decision in *T.P.Long*.

For an insightful discussion of this and related issues, and other case citations, *See* Mirsky, Conway and Humphrey, "The Interface Between Bankruptcy and Environmental Laws," 46 The Bus. Law. 626, 648 (1991) and Comment, "Toxic Tug-of-War: Environmental Cleanup Costs, Bankruptcy and the Administrative Expense Priority -- Is It a Collision of Conflicting Policies or Just Plain Confusion?", 21 Seton Hall Law Rev. 832 (1991).

The burden of proving entitlement to administrative expense status is on the claimant. *Matter of Patch Graphics*, 58 B.R. 743, 745 (Bkrtcy. W.D.Wis. 1986); *In re Transouth Truck Equipment, Inc.*, 87 B.R. 937 (Bkrtcy. E.D.Tenn. 1988). Similarly, the burden of proving the existence of a lien is on the claimant. *See* Code § 363(o)(2).

classification and payment provisions by designating such obligations as "regulatory" would violate the Code.

It follows that obligations to clean up environmental contamination which occurred prepetition, and which can only be satisfied by spending money, should generally be defined as money judgments for purposes of Code § 362(b)(-5), rather than as other types of claims. Otherwise, injunctive relief would be required under Code § 105(a) in all of these cases to prevent violation of the Bankruptcy Code provisions regarding priority of payment. Congress could not have intended such a result.

Moreover, this analysis takes into account the relationship among Code §§ 362(a)(1), (a)(2), (a)(3), (b)(4) and (b)(5). Subsections (b)(4) and (b)(5) of § 362 provide that the automatic stay of § 362(a)(1) and (a)(2) do not apply to actions to enforce police and regulatory powers. Subsections 362(a)(1) and (a)(2) merely deal with the commencement or continuation of the police or regulatory action. *(b)(4) and (b)(5), however, do not provide an exception to 362(a)(3),* which enjoins "*any act* to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[12] If subsection 362(a-)(3) enjoins any such acts, it makes no difference whether the state is attempting to compel cleanup through payment of money to the state itself or to some third party who will perform the cleanup; either way, the automatic stay of § 362(a)(3) still applies, and the court must approve the expenditure as justified under the Code's classification and distribution scheme if there is any dispute about it.

The DEP also argues that cleanup is required under *Midlantic Nat'l. Bank v. New Jersey Dept. Envtl. Protection*,

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[12] *See* Mirsky, Conway and Humphrey, n. 11 *supra*, at 638-39.

106 S. Ct. 755 (1986), 474 U.S. 494, 88 L. Ed. 2d 859, Although *Midlantic* can be reconciled with *Kovacs*,[13] it is unnecessary to do so in this case, because *Midlantic* is distinguishable for a very basic reason. In *Midlantic*, the trustee was attempting to abandon property under Code § 554. Abandonment is "the release from the debtor's estate of property previously included in that estate." 2 W. Norton, Bankruptcy Law and Practice, § 39.01 (1984). *Midlantic* created a narrow exception to the abandonment power for certain types of environmental obligations. However, there can be no abandonment unless the estate has some property interest to abandon. In this case, the debtor has had no such interest for years. Hence, *Midlantic* is obviously not applicable.

V.
THE DEP'S CLAIM IS TIME-BARRED

Bankruptcy Rule 3003(c)(2) provides that any creditor whose claim is scheduled as disputed must file a proof of claim within the time prescribed by the court. Bankruptcy Rule 2002(a)(8) requires that the court clerk must give not less than 20 days notice by mail of the time fixed for filing proofs of claims under Rule 3003(c). In this case, the clerk mailed the order and notice of the bar date to the Attorney General and the DEP, but they have no record of receipt of the order, and hence they deny service.

Bankruptcy Rule 9006(e) provides that service of notice by mail is complete on mailing. There is a presumption that an item which is mailed to an accurate address has been received by the addressee. *Hagner v. United States*, 285

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[13] See this court's opinion in *In re Heldor*, 131 B.R. 578, rendered on the same date as this opinion.

U.S. 427, 76 L. Ed. 861, 52 S. Ct. 417 (1932). That presumption has been recognized in a long line of bankruptcy cases, and denial of receipt does not rebut the presumption. *In re Longardner & Associates*, 855 F.2d 455 (7th Cir. 1988), *cert. denied* 489 U.S. 1015, 103 L. Ed. 2d 191, 109 S. Ct. 1130 (1989); *In re Ricketts*, 80 B.R. 495 (9th Cir. B.A.P. 1987); *In re Robintech*, 69 B.R. 663 (1987), *rev. on other grounds* 863 F.2d 393, *cert. denied* 493 U.S. 811, 110 S. Ct. 55, 107 L. Ed. 2d 24 (1987); *United States v. Cresta*, 40 B.R. 953 (Bkrtcy.E.D.Pa. 1984); *In re Thole*, 31 B.K. 548 (Bkrtcy.D.Minn. 1983); *In re Cleary*, 18 B.R. 114 (Bkrtcy.W.D.Pa. 1982); *In re Heyward*, 15 B.R. 629 (Bkrtcy.E.D.N.Y. 1981); *In re Torres*, 15 B.R. 794 (Bkrtcy-.E.D.N.Y. 1981); *American Family Insurance Group v. Gumieny, (In re Gumieny)*, 8 B.R. 602 (Bkrtcy. E.D.Wis. 1981). The rule is apparently to the contrary in the Sixth Circuit, according to *In re Yoder Co.*, 758 F.2d 1114 (6th Cir. 1985). That case, however, is distinguishable on its facts, because there was no proof that the notice was actually mailed to the creditor, and his name was not listed on the matrix of creditors filed with the court. To the extent that *Yoder* contains language extending its holding to cases where mailing is proven, it is clearly the minority view, and its reasoning is unpersuasive.

> If a party were permitted to defeat the presumption of receipt of notice resulting from the certificate of mailing by a simple affidavit to the contrary, the scheme of deadlines and bar dates under the Bankruptcy Code would come unraveled.

Ricketts, supra, 80 B.R. at 497.

The Court, therefore, finds that the State of New Jersey was served through the Attorney General and DEP with the order setting the bar date for filing proofs of claim, together

with notice that its claim was disputed and that it had to file a proof of claim by January 2, 1990. Since the State failed to file such a claim, Bankruptcy Rule 3003(c)(2) provides that the State shall not be treated as a creditor with respect to such claim for purposes of voting on any plan of reorganization and distribution of funds thereunder.[14]

VI.
THE SECTIONS OF ECRA, AND REGULATIONS AND ADMINISTRATIVE ORDERS THEREUNDER WHICH PURPORT TO LIMIT THE EFFECT OF BANKRUPTCY ON CLEANUP OBLIGATIONS, AND WHICH PURPORT TO CREATE NEW OBLIGATIONS WHEN A BANKRUPTCY CASE IS FILED, VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

This opinion has thus far held that in a bankruptcy case, a cleanup obligation arising from prepetition environmental contamination is a claim which is subject to the Bankruptcy Code provisions regarding classification, distribution and dischargeability. ECRA, however, says otherwise. N.J.S.A. 13:1K-12, entitled "Obligations imposed by act not affected by bankruptcy proceedings and constitute continuing regulatory obligations imposed by state," provides as follows:

> No obligations imposed by this act shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this act shall constitute continuing regulations imposed by the State.

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[14] For a general discussion of the filing of proofs of claim by environmental creditors, *see* Mirsky, Conway & Humphrey, n. 11 *supra*, at 670-71.

It is therefore necessary to consider the relationship between that section of ECRA and the relevant sections of the Bankruptcy Code.

The United States Constitution, Article VI, Clause 2, provides that "this Constitution, and the Laws of the United States, which shall be made in pursuance thereof . . . shall be the supreme Law of the Land." Article VI, Clause 2 of the Constitution is generally referred to as the Supremacy Clause. "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Perez v. Campbell*, 402 U.S. 637, 91 S. Ct. 1704 (1971), 29 L. Ed. 2d 233. If either the purpose or the effect of a state statute interferes with the effectiveness of a federal statute, the state statute is rendered invalid by the Supremacy Clause. *Id.* at 652.

In Perez, the plaintiff was involved in an automobile accident in Arizona which resulted in a judgment against Perez for injuries and property damage suffered by others involved. Perez did not have liability insurance. He later filed a bankruptcy petition under the Bankruptcy Act, the predecessor to the Bankruptcy Code, and received a discharge of the tort judgment. However, Arizona's Motor Vehicle Safety Responsibility Act required payment of such judgments and provided that the judgment debtor's driver's license and registration shall be suspended until such payment. § 28-1163(B) of the Arizona Act also provided that "[a] discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this Article."

The Court found that the purpose of the Arizona Act was the protection of the public using the highways from

financial hardship which may result from the use of the automobile by financially irresponsible persons. *Id.* at 644 (quoting *Schecter v. Killingsworth*, 93 Ariz. 273, 280, 380 P.2d 136, 140 (1963)). The Court also found that one of the purposes of the Bankruptcy Act was to give debtors a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. *Id.* 402 U.S. at 648. The Court stated that its function is to determine whether a challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* at 649, 91 S. Ct. at 1711. The Court concluded that the Arizona Act had both the purpose and the effect of giving judgment creditors a powerful weapon with which to force bankrupts to pay their debts despite their discharge. *Id.* at 654. Hence, § 28-1163-(b) of the Arizona Act was unconstitutional.

By comparison, the primary purpose of ECRA is to ensure cleanup of property which has been contaminated by hazardous substances or wastes by requiring the execution of an approved cleanup plan as a precondition to the closure, sale or transfer of such property. Senate Energy and Environment Committee Statement, Assembly No. 1231-L. 1983, c.330, *printed in* N.J.S.A. after 13:1K-6. To that end, "the bill further requires the owners of hazardous substance or waste operations to obtain a surety bond or other financial security which should guarantee the implementation of the cleanup plan." *Id.* Although the Committee Statement does not refer to N.J.S.A. 13:1K-12, it is clear that its purpose is to further the express requirement of financial security for cleanup obligations by stating that a bankruptcy proceeding shall not discharge, limit or affect an obligation imposed by ECRA.

The primary purposes of the Bankruptcy Code are to give debtors a fresh start and to provide for an orderly and

equitable distribution of their assets among creditors. *See generally* Weintraub & Resnick, Bankruptcy Law Manual, para. 1-3 and para. 8-89 (1986). To those ends, "claim" is defined very broadly as, essentially, any right to payment. Code § 101(5)(A). As previously noted, the Supreme Court held in *Davenport* that "the plain meaning of 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation." 110 S. Ct. at 2131. Moreover, the Code also defines "liens" for bankruptcy purposes. "'Lien' means charge against or interest in property to secure payment of a debt or performance of an obligation." Code § 101(33). The legislative history to § 101(33) states:

> the definition is new and very broad. A lien is defined as a charge against or interest in property to secure payment of a debt or performance of an obligation. It includes inchoate liens.

H.R. Rep. No. 595, 95th Cong. 1st Sess. 312 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 25 (1978). Thus, Congress has determined what shall constitute claims and liens for bankruptcy purposes, and those definitions are very broad. The purpose of such breadth is to deal in bankruptcy cases with all obligations of the debtor requiring payment of money. By attempting to dictate that cleanup obligations triggered by ECRA do not fall within those definitions, and hence are not affected by bankruptcy, N.J.S.A. 13:1K-12 plainly has both the purpose and effect of interfering with the Bankruptcy Code provisions in question.[15]

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[15] Although N.J.S.A. 13:1K-12 says a cleanup obligation imposed by ECRA is not a lien, it is arguable that it is a lien within the broad (continued...)

[15] (...continued)
definition of Code § 101(33), since it is arguably a "charge against" or "interest in" property. Albeit ECRA refuses to call the obligation a lien, it nevertheless treats it like one by providing that unless the obligation is satisfied prior to a transfer of the subject property, the transferee can void the sale and recover damages. *See* N.J.S.A. 13:1K-13 (West Supp. 1991). Such rights are similar to the rights that the holder of an unsatisfied lien would have, in that the lien would remain a charge against the property notwithstanding the transfer. The obligation might be construed as an inchoate lien. *See Simon v. Oldmans Tp.*, 203 N.J. Super. 365, 375, 497 A.2d 204, 210 (Ch. Div. 1985) (the existence of contamination covered by the Spill Act creates "the potential existence of a super lien" which must be disclosed to a purchaser).

ECRA and the other state environmental statutes do not create the obligation to clean up contamination; they merely provide procedures for enforcement of it. The state has an inherent right to require remediation of injuries to the environment. *See Department of Envtl. Protection v. Ventron Corp.*, 94 N.J. 473, 499, 468 A.2d 150 (1983) ("the Spill Act does not so much change substantive liability as it establishes new remedies for activities recognized as tortious both under prior statutes and the common law.") *see also Lansco, Inc. v. Dept. of Envtl. Protection*, 138 N.J. Super. 275, 283, 350 A.2d 520, 524 (Ch. Div. 1975), *aff'd.* 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976) *cert. denied* 73 N.J. 57, 372 A.2d 322 (1977). The Spill Act, N.J.S.A. 58:10-23.11 *et seq.* covers the same hazardous substances as ECRA, and provides that if the state cleans up the contamination itself, it has a first lien on the subject property to the extent of the cost of cleanup when a notice of lien is filed. N.J.S.A. 58:10-23-11f(f) (West Supp. 1991). *See Superior Air Prod. v. NL Industries*, 216 N.J. Super. 46, 522 A.2d 1025 (App. Div. 1987) (analyzing the relationship between ECRA and the Spill Act). It is arguable that the state therefore has an inchoate statutory lien for cleanup obligations which are the subject of the Spill Act and ECRA, and which have not been cleaned up by the State under the Spill Act. That is exactly how purchasers and sellers of industrial establishments treat the obligation, because purchasers will not close until the obligation is satisfied or an administrative consent order is entered. However, if the

(continued...)

For the same reasons, the provisions in N.J.S.A. 13:1K-12 to the effect that cleanup obligations cannot be limited or discharged in bankruptcy also conflict with the Code. Code sections 1141(d), 727 and 523 specify which obligations shall and shall not be discharged, and they contain no reference to environmental cleanup obligations.

By defining cleanup obligations as "continuing regulatory obligations" in N.J.S.A. 13:1K-12 the State of New Jersey apparently wanted "continuing regulatory obligations" to be treated as some new class of obligations for bankruptcy purposes which transcend the categories set forth in the Bankruptcy Code as described in Section III, *supra*. This the State cannot do. To the extent that they require expenditure of a bankruptcy estate's money, even "continuing regulatory obligations" are either secured claims, administrative expenses, priority claims or unsecured claims as defined by Congress, and are subject to the provisions of the Bankruptcy Code regarding payment.

Because N.J.S.A. 13:1K-12 conflicts with the Bankruptcy Code in both its purpose and its effect, it violates the Supremacy Clause and is void on its face.[16]

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[15] (...continued)
obligation is not a lien, it is not because N.J.S.A. 13:1K-12 so states; it will be because the courts determine that the intention of Congress in enacting Code § 101(33) was to exclude such charges against property from the definition of lien. For purposes of this case, it is assumed that the obligation is not a lien, without deciding the question.

[16] To the extent that *Matter of Borne Chemical Co.*, 54 B.R. 126 (Bkrtcy. D.N.J. 1984) held to the contrary, this court disagrees with it and declines to follow it for the reasons set forth herein. *Borne Chemical*, however, compared the Code with ECRA generally, without focusing on the sections of ECRA addressed herein. This court does not
(continued...)

Moreover, the other provisions of ECRA, its regulations and orders which provide for treatment of cleanup obligations in bankruptcy meet the same fate. N.J.S.A. 13:1K-8(b) states that ECRA is triggered by the filing of a bankruptcy petition. N.J.A.C. 7:26B-1.6 specifies the proceedings or events in any bankruptcy proceeding which trigger ECRA. N.J.A.C. 7:26B-1.8(A)(4) provides that any corporate reorganization not substantially affecting ownership or control of the industrial establishment does not trigger ECRA. And N.J.A.C. 7:26B-1.3 states that:

> "corporate reorganization not substantially affecting ownership" means the restructuring or reincorporation by the board of directors or the shareholders of a corporation, *which does not diminish the availability of assets for any environmental cleanup, diminish the Department's ability to reach those assets, or otherwise hinder the owner's or operator's ability to cleanup the industrial establishment*. . . . [emphasis added].

Reading these provisions together with N.J.S.A. 13:1K-12, the obvious intent of the State of New Jersey and the DEP is to provide that when a bankruptcy petition is filed, ECRA is

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[16] (...continued)
suggest that sections of ECRA other than those addressed herein are unconstitutional. Moreover, unlike *Borne Chemical*, this opinion does not address cases in which a debtor in possession or trustee is selling or assigning contaminated real property. While this court's determinations as to the effect of ECRA on such sales and assignments will be informed in part by the analysis in this opinion, such transfers raise questions which are beyond the scope of this case. There are compelling reasons to require trustees and debtors in possession to comply with ECRA as a condition to such transfers, and compliance in those cases may be consistent with this opinion for reasons not addressed herein.

triggered, and either the cleanup obligation must be satisfied or the debtor's assets must remain intact and subject to the Department's ability to reach them. Both the purpose and the effect of these provisions is to require that cleanup obligations must either receive the highest priority in bankruptcy cases, or be undisturbed by them. For the reasons previously stated, the State cannot limit the definitions, purposes and effect of the Bankruptcy Code in that manner. All of the subject provisions are therefore void under the Supremacy Clause to the extent that they purport to dictate the treatment of cleanup obligations in bankruptcy cases. For the same reasons, the Administrative Order which was entered in this case, and which purported to dictate its own treatment in bankruptcy, is also void.[17]

VII.
CONSIDERATIONS REGARDING THE RELATIONSHIPS AMONG THE FEDERAL AND STATE LEGISLATURES AND THE COURTS.

It is appropriate to add certain additional observations, to place the foregoing analysis and conclusions in the proper context. This court does not dispute that contamination of the environment is a matter of grave concern to this country

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[17] Alternatively, if the cleanup obligation is an inchoate lien which becomes choate under ECRA when a bankruptcy petition is filed, *see n.* 15 *supra*, it is voidable under Code § 545(1)(A). Other so-called "ipso facto" clauses of statutes or contracts which are triggered by the filing of a bankruptcy petition are also void in bankruptcy. *See* 11 U.S.C. §§ 365(b)(2)(A), 365(e)(1)(A) and 541(c)(1)(B); *In re Texaco*, Inc., 73 B.R. 960, 968 (Bkrtcy. S.D.N.Y. 1987).

and this state.[18] There are of course different degrees of danger presented by different types of contamination, but the worst forms can be life threatening. However, *the ultimate issue in cases such as this is not whether contamination should be cleaned up, but who must pay for it.* By attempting to compel bankruptcy estates to clean up contamination,

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[18] Arguments, however, are being made with increasing frequency in this State that environmental concerns are being exalted by state law over other public policy concerns to an extent which extracts too great of a price. An example follows from a recent New Jersey Law Journal editorial entitled "The New Religion":

> For the past 20 years or so the protection of the environment has taken on many of the attributes of a religion. Its adherents, the environmentalists, have aligned themselves against the purported forces of darkness and evil. Those who question the faith are castigated and ridiculed as heretics and worse -- the very despoilers of mother earth.
>
> Nowhere has this passion play run as long and as consistently as in New Jersey. And we would be remiss if we failed to recognize that which is popular is also politically expedient. Our candidates for elective office have tripped over themselves extolling their environmental records and trumpeting the strength of their commitment.

128 N.J.L.J., at 1218. (August 22, 1991). The editorial goes on to suggest that the state government's approach to environmental questions may have contributed to New Jersey's loss of almost 200,000 jobs in two years. The editorial urges greater balance and moderation by New Jersey state government in weighing economic and environmental concerns.

This court expresses no opinion on this controversy, and merely notes its existence. If it is true, however, that the state government's approach to environmental concerns has contributed to the recession and consequent loss of employment in this State, then it would follow that that approach has also contributed to the unprecedented explosion in the number of bankruptcy cases filed in this State in the last several years.

as opposed to having the state do so, the DEP is at least as concerned with the public fisc as with the public health.[19] The DEP admits as much: "Public money is scarce; necessary cleanups abound."[20] Both concerns are of course important, but they do not enable the DEP to rewrite the Bankruptcy Code. Nor can the courts do so:

> [Courts] are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond that is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge it nor contract it.

F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L.Rev. 527, 533-34 (1947). For that reason, it has been held in this Circuit that the courts may not create a new priority of payment in bankruptcy where the Congressional mandate is clear that no such priority shall be accorded.

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[19] *Midlantic Nat'l. Bank v. New Jersey Department of Envtl. Protection*, 474 U.S. 494, 507, 106 S. Ct. 755 (1986), 88 L. Ed. 2d 859 (Rehnquist, J., dissenting); *In re Anthony Ferrante & Sons, Inc.*, 119 B.R. 45, 50 (D.N.J. 1990).

[20] Brief of DEP filed March 8, 1991, at 32. It should also be noted that there are often other parties who are also responsible for cleanup, including any owner or operator other than the debtor, *see* N.J.S.A. 13:1K-9, and prior owners or tenants who caused or contributed to contamination. *See, e.g. Superior Air Prod. v. NL Industries*, 216 N.J. Super. 46, 522 A.2d 1025 (App. Div. 1987).

Southern Ry. Co. v. Johnson Bronze Co., supra; In re Columbia Ribbon Co., 117 F.2d 999, 1002 (3d Cir. 1941). For the same reason, the courts cannot create a new priority for payment of environmental obligations, no matter how compelling the public policy concerns reflected in New Jersey's environmental laws.

We have recently seen a classic example of the proper relationship between the judicial and the legislative branches in situations such as this. In *Davenport, supra*, the Supreme Court held that restitution orders imposed as a condition of probate in state criminal proceedings were "claims" dischargeable in a chapter 13 case. Congress subsequently overruled the result in *Davenport* by withdrawing the power to discharge restitution orders in chapter 13, rather than by restricting the definition of "claim" under the Code. *See* Criminal Victims Protection Act of 1990, Pub.L. 101-581, § 3, 104 Stat. 2865. *See also Johnson, supra* 111 S. Ct. at 2154, n. 4. If a federal statute needs to be changed, that is how it should be done.

The respective roles of the state and federal legislatures and the courts in this situation can be summarized as follows. A state legislature can determine whether environmental contamination creates legal obligations. *Only* Congress, however, can determine whether such obligations constitute claims for bankruptcy purposes, and their priority and dischargeability in bankruptcy cases. A state legislature can determine whether environmental obligations shall be secured by liens on a debtor's property. *Only* Congress, however, can determine how such liens shall be treated in bankruptcy cases. And if there is a question as to whether particular obligations are claims or liens for bankruptcy purposes, the definitions provided by Congress in Code § 101 shall be dispositive. The obligation of the courts is to fulfill the

legislative intent within that framework, without substituting their own views of what the statutes should provide.

For the foregoing reasons, the Debtor's motion for summary judgment is granted, and the DEP's motion is denied. This adversary proceeding is closed. The Debtor is to submit an order under the five-day rule.

[SEAL]

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF HAZARDOUS WASTE MANAGEMENT
Lance R. Miller, Acting Director
CN 028
Trenton, N.J. 08625-0028
Fax # (609) 633-1454

IN THE MATTER OF	:	ADMINISTRATIVE ORDER AND NOTICE OF CIVIL ADMINISTRATIVE PENALTY ASSESSMENT
Torwico Electronics, Inc.	:	
410 Oberlin Avenue South	:	
Lakewood, NJ 08701	:	

This Administrative Order and Notice of Civil Administrative Penalty Assessment is issued pursuant to the authority vested in the Commissioner of the New Jersey Department of Environmental Protection (hereinafter "NJDEP" or the "Department") by N.J.S.A. 13:1D-1 *et seq.*, and the Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.* and duly delegated to the Assistant Director for Enforcement of the Division of Hazardous Waste Management pursuant to N.J.S.A. 13:1B-4.

FINDINGS

1. The Department has determined that Torwico Electronics, Inc. (hereinafter "Torwico") is a generator of hazardous waste as defined in N.J.A.C. 7:26-1.4. Torwico was located at Block 1160.03, Lot 47, 1515

Route 70, Township of Lakewood, County of Ocean, State of New Jersey, with EPA *Id#* NJD002387108. In September 1985, Torwico relocated to Block 1600, Lot 12, 410 Oberlin Avenue South, Township of Lakewood, County of Ocean, State of New Jersey.

2. On November 13, 1989, a Department representative conducted investigations at both the former and present sites, referenced in paragraph 1 above, and noted the following:

   a. Torwico treated, stored, disposed of, transported or offered for transportation, hazardous waste without having received an EPA identification number. Specifically, Torwico failed to obtain a new EPA *Id* number for its new operating location, in violation of N.J.A.C. 7:26-7.4(a)1.

   b. Torwico caused, suffered, allowed or permitted the construction, installation, modification or operation of a hazardous waste facility without having submitted Part A and B of a permit application. Specifically, Torwico disposed of hazardous wastes into the seepage pit located in the former site, without first obtaining a permit to operate a hazardous waste facility, in violation of N.J.A.C. 7:26-12.1-(a).

3. Based on a letter dated January 10, 1990 from Torwico, the Department has determined that Torwico has attained compliance with the violation of N.J.A.C. 7:26-7.4(a)1.

4. To this date, Torwico has not attained compliance with the violation of N.J.A.C. 7:26-12.1(a).

5. Based on the facts set forth in these FINDINGS, the Department has determined that Torwico has violated the

Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.*, and the regulations promulgated pursuant thereto, N.J.A.C. 7:26-1 *et seq.*, specifically N.J.A.C. 7:26-7.4(a)1 and 12.1(a).

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT TORWICO SHALL:

6. Within fifteen (15) calendar days upon receipt of this Administrative Order, submit a written closure plan pursuant to N.J.A.C. 7:2609.8 *et seq.*, for closure of the seepage pit referenced in paragraph 2b above, so as to be in compliance with N.J.A.C. 7:26-12.1(a).

7. Within twenty (20) calendar days upon receipt of this Administrative Order and Notice of Civil Administrative Penalty Assessment submit the enclosed **VERIFICATION OF COMPLIANCE** by certified mail, return receipt requested or by hand delivery to the address below, indicating that you have corrected the violations referenced in paragraph 4 above.

New Jersey Department of Environmental Protection
Division of Hazardous Waste Management
Bureau of Compliance and Technical Services
CN 028
Trenton, NJ 08625
Attention: Jay Basavanhally

THIS ORDER SHALL BE EFFECTIVE UPON RECEIPT.

NOTICE OF CIVIL ADMINISTRATIVE PENALTY ASSESSMENT

8. Pursuant to N.J.S.A. 13:1E-9e and based upon the above **FINDINGS**, the Department has determined that a civil administrative penalty should be assessed against Torwico in the amount of $22,500.00.

9. Payment of the penalty is due when a final order is issued by the Commissioner subsequent to a hearing, if any, or when this Notice of Civil Administrative Penalty assessment becomes a final order (see following paragraph). Payment shall be made by certified check payable to "Treasurer, State of New Jersey" and shall be submitted to:

    New Jersey Department of
      Environmental Protection
    Division of Financial Management
      Planning and General Services
    Bureau of Revenue
    CN 402
    Trenton, NJ 08625

10. If no request for a hearing is received within twenty (20) calendar days from receipt of this Notice of Civil Administrative Penalty Assessment, it shall become a final order upon the twenty-first calendar day following its receipt and the penalty shall be due and payable.

NOTICE OF RIGHT TO A HEARING

11. Pursuant to N.J.S.A. 52:14B-1 *et seq.* and N.J.S.A. 13:1E-9, Torwico is entitled to an administrative hearing. Any hearing request shall be delivered to the address below within twenty (20) calendar days from

receipt of this Administrative Order and Notice of Civil Administrative Penalty Assessment.

Assistant Director for Enforcement
Division of Hazardous Waste Management
401 East State Street
CN 028
Trenton, New Jersey 08625
Attention:
Wayne C. Howitz, Assistant Director

12. Torwico shall, in its request for a hearing, furnish NJDEP with the following:

    a. A statement of the legal authority and jurisdiction under which the hearing or action to be taken is to be held;

    b. A reference to the particular sections of the statute and rules involved;

    c. A short and plain statement of the matters of fact and law asserted; and

    d. The provisions of this Administrative Order and Notice of Civil Administrative Penalty Assessment to which Torwico objects, the reasons for such objections, and any alternative provisions proposed.

GENERAL PROVISIONS

13. This Administrative Order and Notice of Civil Administrative Penalty Assessment is binding on Torwico, its principals, directors, officers, agents, successors, assigns, any trustee in bankruptcy or other trustee, and any receiver appointed to a proceeding in law or equity.

14. Notice is given that violations of any statutes, rules or permits other than those herein cited may be cause for additional enforcement actions, either administrative or judicial. Be issuing this Administrative Order and Notice of Civil Administrative Penalty Assessment the Department does not waive its right to initiate additional enforcement actions.

15. No obligations imposed by this Administrative Order and Notice of Civil Administrative Penalty Assessment (with the exception of paragraph (8) above) are intended to constitute a debt, damage claim, penalty or other civil action which should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers or the State of New Jersey, intended to protect the public health, safety, welfare, and environment.

16. Notice is given that pursuant to N.J.S.A. 13:1E-9e, the Department is authorized to assess a civil administrative penalty of not more than $25,000 for each violation and additional penalties of not more than $2,500 for each day during which the violation continues.

17. Notice is further given that pursuant to N.J.S.A. 13:1E-9f, any person who violates N.J.S.A. 13:1E-1 *et seq*. or any code, rule, or regulation promulgated thereunder shall be liable to a penalty of not more than $50,000 per day of such violation, and each day's continuance of the violation shall constitute a separate violation.

18. Notice is further given that pursuant to N.J.S.A. 13:1E-9f, any person who violates an administrative order issued pursuant to N.J.S.A. 13:1E-9c, or a court order issued pursuant to N.J.S.A. 13:1E-9d, or who fails to pay a civil administrative penalty in full after it is due

shall be subject upon order of a court to a civil penalty not to exceed $100,000 per day of such violation and each day's continuance of the violation shall constitute a separate violation.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: *[s] Wayne C. Howitz*
Wayne C. Howitz
Assistant Director
Hazardous Waste Enforcement

Supreme Court, U.S.
FILED
MAR 28 1994
OFFICE OF THE CLERK

No. 93-1187

In the

Supreme Court of the United States

October Term, 1994

Torwico Electronics, Inc.,
Petitioner,

v.

State of New Jersey, Department of Environmental Protection and Energy,
Respondent.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the obligation of petitioner to comply with state and federal regulatory requirements associated with the generation and use of hazardous substances constitutes a dischargeable "claim" under 11 U.S.C. 101(5) and Ohio v. Kovacs, 469 U.S. 274 (1985), where, as in this case, the State is merely seeking performance by the debtor which does not give rise to a "right to payment."

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COUNTERSTATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to challenge a determination of the United States Court of Appeals for the Third Circuit holding that the enforcement of state statutes imposing regulatory requirements on the generation, use and disposal of hazardous substances and waste that require performance and not payment do not constitute "claims" subject to discharge and are therefore enforceable against debtors in bankruptcy. The court below correctly found that in this matter the State was seeking compliance by petitioner with its obligations under the New Jersey Environmental Cleanup Responsibility Act ("ECRA"), N.J. Stat. Ann. 13:1K-6 et seq., and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§6901-6991, and that the State's enforcement of the law does not constitute the act of a creditor trying to achieve a preference over other creditors. Thus, the State was not asserting a "claim" as that term is defined in the Bankruptcy Code and should not have been enjoined by the Bankruptcy Court from enforcing its laws against petitioner.

1. Statutory Background

ECRA, now the Industrial Site Recovery Act ("ISRA"), 1993 N.J. Laws 139, was enacted in 1983 for the purpose of protecting the public from having to bear the expense of cleaning up abandoned plant sites contaminated with hazardous wastes. See generally, J. Schmidt, New Jersey's Experience Implementing the Environmental Cleanup Responsibility Act, 38 Rutgers L. Rev. 729 (1986). To achieve this goal, ECRA provides that, upon the closure, sale or transfer of an industrial establishment, the owner or operator of the industrial establishment must either submit a cleanup plan to the Department detailing the measures necessary to detoxify the property, or obtain a "negative declaration" from the Department that there has been no discharge of hazardous substances or wastes or that any such discharge has been cleaned up and there remain no hazardous substances or wastes on the property. N.J. Stat.

Ann. 13:1K-8(g).[1] "Industrial establishments" are those (1) at which hazardous substances or wastes are present and (2) which also have a designated reference number as determined by the Standard Industrial Classification ("SIC") manual published by the Federal Office of Management and Budget. N.J. Stat. Ann. 13:1K-8f.

In enacting ECRA, the New Jersey Legislature recognized that the generation, handling, storage and disposal of hazardous substances and wastes pose an inherent risk of harm, and the closing of operations and the transfer of real property where hazardous substances were used must be conducted in a rational and orderly way so as to mitigate potential risk. N.J. Stat. Ann. 13:1K-7. The magnitude of New Jersey's hazardous waste problem is beyond dispute. Matter of Kimber Petroleum Corp., 110 N.J. 69, 88 (1988), 539 A.2d 1181, 1190 (Wilentz, C.J. dissenting). Decades of industrial activity have left the State with a legacy of hazardous waste. That legacy now threatens the State's public health and ecology. In Re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 446 (1992), 608 A2d 288, 289. Public money does not even "begin to meet New Jersey's cleanup needs." Kimber, 110 N.J. at 89; 539 A2d 1101, 1191. The Legislature decided that the obligation to clean up the contaminated sites rests with the polluters themselves. Id. at 90.

Although ECRA does not impose an independent duty to clean up the property during a period of operation, the owner cannot walk away after deciding to cease operations without developing and implementing a cleanup plan. Dixon Venture v. Dixon Crucible Company, 122 N.J. 228, 584 A.2d 797 (1991). Furthermore, ECRA was

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[1] The State, therefore, does not "choose to proceed under ECRA" as petitioner maintains (Pet. Brief at 17, n. 19). ECRA is triggered automatically, imposes a self-executing duty to comply on the owner or operator, and does not provide the State with a "right to payment" at all.

intended to impose upon both the owner and the operator of an industrial establishment a "self-executing duty to remediate" upon closure, sale or transfer of certain potentially polluted properties.[2] See Superior Air Products Co. v. N.L. Industries, Inc., 216 N.J. Super. 46, 62, 522 A.2d 1025, 1041 (App. Div. 1987), certif. den., 126 N.J. 308, 598 A.2d 872 (1991).[3] By the express terms of the statute, compliance with ECRA "constitute[s] [a] continuing regulatory obligation ... imposed by the State." N.J. Stat. Ann. 13:1K-12.

As a generator of hazardous waste, petitioner is also required to comply with obligations emanating from the Resource Conservation and Recovery Act, which was enacted by Congress to regulate the treatment, storage, and disposal of hazardous wastes. See Matter of Commonwealth Oil Refining Company, 805 F.2d 1175 (5th Cir. 1986), cert. denied, 483 U.S. 1005 (1987) (the objective of RCRA is "to promote the protection of health and the environment" and "[a]n injunction which does not compel some expenditure or loss of monies may often be an effective nullity"). The Environmental Protection Agency ("EPA") delegated the enforcement of RCRA to the State of New Jersey in 1983, and the State thereafter promulgated implementing regulations under the Solid Waste Management Act ("SWMA"), N.J. Stat. Ann. 13:1E-1 et seq. See N.J.

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[2] Torwico's lease agreement with George Allen Associates, however, clearly identified Torwico as the party responsible for complying with ECRA. ECRA allows such an agreement to transfer joint and several liability to one party in this way. See 1993 N.J. Laws 139, section 20.

[3] Petitioner's comments are misleading when citing Superior Air Products. "New Jersey courts have concluded that ECRA and the Spill Act apply "in pari materia." (Pet. Brief at 16, n. 5). Petitioner's implication to the contrary notwithstanding, the court concluded that such an application of ECRA and the Spill Act illustrated that the State cannot be sued under the Environmental Rights Act to enforce the Spill Act against a responsible party when ECRA has been triggered. This is exactly the opposite of what petitioner is advocating.

Admin. Code. 7:26-1 et seq (setting forth, inter alia, requirements for disposal of hazardous wastes). See generally, W. Mugdan and B. Adler, 1984 RCRA Amendments: Congress as Regulatory Agency, 10 Columbia J. of Env. L. 215.

2. History of These Proceedings

Petitioner, Torwico Electronics, Inc. ("petitioner" or "Torwico"), a manufacturer of electronic transformers, is an "industrial establishment" as that term is defined in ECRA and a "generator" of hazardous waste as defined by RCRA. Up until 1985, petitioner conducted its business at a site located in Lakewood, New Jersey. In 1985, it relocated to a new site in Lakewood, where it continued to manufacture transformers until it sold its business in 1993, a fact that is of significance to the dischargeablity of a "claim" but which petitioner failed to disclose in its brief. [4] Petitioner became responsible for ECRA compliance in 1985 when it ceased operating at its original Lakewood site and transferred its operations to another location. See N.J. Stat. Ann. 13:1K-9. Petitioner moved without complying with ECRA.

On August 4, 1989, Torwico filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Several months later, on November 13, 1989, the Department performed an inspection of Torwico's former site and discovered a hidden, illegal seepage pit (not a septic system, as petitioner alleges) (Pet. Brief at 5) containing

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[4] Thus, petitioner is now liquidating, rather than reorganizing, under Chapter 11 of the Bankruptcy Code. As a corporate debtor, petitioner will not be discharged of any obligations whether or not they constitute "claims." See 11 U.S.C. §1141 (d)(3) (confirmation of a plan does not discharge a corporate debtor if the plan provides for the liquidation of all or substantially all of the property of the estate and if the debtor does not engage in business after the consummation of a plan).

hazardous wastes (Ja219-Ja231)[5]. The contamination in the pit was found to be migrating off-site, into local waters and to be approaching a potable water supply (Ja230).

On April 9, 1990, the Department issued an Administrative Order and Notice of Civil Administrative Penalty Assessment to petitioner (Pa61)[6]. Among other things, the Order required petitioner to apply for a permit for its seepage pit, obtain an identification number from the EPA, and develop a closure plan for the pit (Pa63). In response to the Administrative Order, petitioner filed a Summons and Complaint for Declaratory Judgment and Injunctive Relief against the Department, asking the Bankruptcy Court to enjoin the Department from enforcing any applicable environmental laws against petitioner (Ja6). Petitioner sought a declaratory judgment that any environmental obligations that petitioner may have were "claims" under 11 U.S.C. 101(5) and that the State's failure to file a timely proof of claim precluded the State from requiring petitioner to comply with New Jersey's environmental laws and regulations (Ja8). In August 1990, the Department issued a Notice of Violation of ECRA to both petitioner and George Allen Associates, Torwico's landlord and the owner of the Lakewood site. On November 26, 1990, petitioner moved for summary judgment on its Complaint (Ja14).

On December 6, 1990, the State filed a Notice of Cross-Motion for Summary Judgment arguing that Torwico's obligation to comply with New Jersey's laws does not constitute a "claim" that can be discharged in bankruptcy, but that such obligations are ongoing regulatory responsibilities imposed pursuant to the state's police

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[5] "Ja" cites are to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit.

[6] "Pa" cites are to Petitioner's Appendix.

powers, intended to protect the public health, safety, welfare, and environment (Ja11).

On September 6, 1991, the Bankruptcy Court issued its opinion, now published at 131 B.R. 561 (Pa22), finding that an action to compel compliance with environmental statutes constitutes an "unsecured claim" under 11 U.S.C. §101(5). 131 B.R. 561, 565 (Pa31-32). Because the State did not file a timely proof of claim, the State was barred from ever enforcing ECRA against Torwico. To reach this holding, the Bankruptcy Court first found that any action by the State under the State's police and regulatory powers to compel compliance with environmental laws constituted no more than the enforcement of a "money judgment" within the meaning of the automatic stay provisions of 11 U.S.C. §362(a), rather than "regulatory" obligations, and therefore is not exempt from the automatic stay provisions under 11 U.S.C. §362(b)(4) and (5). An order embodying the court's decision enjoining the State from enforcing certain environmental laws against petitioner and declaring certain portions of the ECRA statute and regulations void was entered on September 20, 1991 (Ja350).

On September 30, 1991, the State appealed to the United States District Court. On December 14, 1993, the Hon. Anne E. Thompson, United States District Judge, entered a Memorandum Opinion and Order vacating the Bankruptcy Court's injunction. The district court held that Torwico's obligation to comply with ECRA is not dischargeable in bankruptcy, and rejected the remainder of the Bankruptcy Court's decision (Pa21). Judge Thompson found that the State has no alternate payment remedy under ECRA and is attempting to remedy both past and ongoing

pollution. The district judge concluded that the State had no obligation to file a claim in the proceeding.[7]

On January 8, 1993, petitioner appealed the order of the district court to the United States Court of Appeals for the Third Circuit. On October 25, 1993, the Court of Appeals affirmed the decision of the district court finding that petitioner's obligation to comply with state and federal environmental laws was not a dischargeable "claim" and that petitioner's obligation to clean up "ran with the waste." Torwico Electronics, Inc. v. State of New Jersey, Department of Environmental Protection and Energy, 8 F.3d 146, 151 (3d Cir. 1993). In coming to this conclusion, the Third Circuit relied on many of the same decisions of this Court and the Second and Seventh Circuits that petitioner mistakenly claims conflict with the opinion below.

REASONS FOR DENYING THE PETITION

This petition for a writ of certiorari should be denied because the decision of the Court of Appeals finding that petitioner's obligation to comply with state and federal regulatory requirements associated with the generation and use of hazardous substances does not constitute a dischargeable "claim" because it does not give rise to a

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[7] The Bankruptcy Court had held that certain sections of ECRA conflict with the Bankruptcy Code, and were therefore invalid under the Supremacy Clause. 131 B.R. at 573 (Pa49-Pa56). In addition, the Bankruptcy Court had held certain provisions of ECRA not in dispute in this case to be unconstitutional under the Supremacy Clause. Notably, the Bankruptcy Court did not limit its constitutional review of ECRA to the provision relevant to "claims"; rather, it reached out, sua sponte, to invalidate several other sections of ECRA that were not challenged by Torwico, and that were not in dispute in this case. See Ja6 (Torwico's complaint); compare 131 B.R. at 576 (Ja340-Ja341). This is part of the decision that was vacated by the District Court. Petitioner did not raise any issue as to the incorrectness of that aspect of the District Court's determination and appealed only the finding that since ECRA has no alternate payment remedy, an obligation to comply with ECRA does not constitute a "claim."

"right to payment", is in accord with the opinion of this Court in Ohio v. Kovacs, upon which the Court of Appeals relied in part, see, Torwico, 8 F.3d at 150, and does not conflict with the decisions of the other circuits. Contrary to the assertions of petitioner, the decision at issue, rather than conflicting with, was in accord with In re Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991), and Matter of CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992). See, Torwico, 8 F.3d at 149.

Petitioner's argument that this decision created a conflict among the circuits and with this Court's decision in Ohio v. Kovacs is entirely erroneous. Furthermore, much of the petition poses what is no more than a hypothetical situation. As misguided as petitioner's hypothesis is as to the deleterious effect on reorganization of compelling a debtor to comply with the law (See, 28 U.S.C. 959(b)) (requiring a debtor-in-possession or trustee to comply with state law throughout the bankruptcy), petitioner is also asking this Court to rule on facts that are not involved in this case. This debtor is not reorganizing. This corporate debtor has sold its business, has ceased operating and is liquidating, which means that there will be no discharge available to petitioner in any event. Thus, the precise issue upon which petitioner seeks certiorari does not arise on the facts of this case.

The notion that petitioner does not have to comply with New Jersey's laws because the Department did not file a proof of claim is legally incorrect. The State is a regulator in this case, not a creditor. The State's enforcement of its environmental regulations seeks compliance by the debtor with the law; it does not constitute the act of a creditor trying to devise a preference over other creditors. See In re Dolly Madison Industries, Inc., 504 F.2d 499, 503 (3d Cir. 1974) ("The mere fact that the debtor's property may be affected by state law does not constitute a 'claim' against that 'property'"). See, also, In re Quanta Resources Corp., 739 F.2d 912, 921-922 (3d Cir. 1984), aff'd sub nom.

Midlantic National Bank v. N.J. Dept. of Environmental Protection, 474 U.S. 494 (1986) ("It cannot be said that the bankruptcy laws were intended to work such a radical change in the nature of local public health and safety regulation -- the substitution of governmental action for citizen compliance -- without an indication that Congress so intended.").

I. The Opinion Below Does Not Conflict With This Court's Opinion in Ohio v. Kovacs.

A. Ohio Had Barred Kovacs From Access To His Property, Appointed A Receiver To Perform The Cleanup And Then Consistently Sought The Payment Of Money.

Petitioner claims that the decision of the Court of Appeals is at odds with the opinion in Ohio v. Kovacs and that the State, in ordering petitioner to meet its statutorily-imposed environmental regulatory obligations, was seeking what is, in essence, the payment of a "money judgment." Petitioner fails to recognize that the narrow ruling of Kovacs is confined to a very specific set of facts that are widely divergent from the facts of this case.

In Kovacs, the State of Ohio sought to enforce an injunction it had obtained against an individual (Kovacs) for various environmental violations. The injunction required Kovacs to remove specified hazardous wastes from his property and to pay the State $75,000. Kovacs failed to comply with his obligations under the injunction. The State then obtained the appointment of a receiver to take possession of Kovacs' property and assets, and to implement the injunction by cleaning up the site. Ohio thereafter endeavored to recover its costs by maintaining

that the costs were not dischargeable "claims."[8] The Court held that Ohio was seeking to enforce a "right to payment." Therefore, it had a claim within the meaning of the definition of that term as used in 11 U.S.C. §101(5).

Contrary to the contentions of petitioner, the Court of Appeals considered Kovacs and correctly pointed out the key distinction in that opinion:

> [a]s Kovacs noted, a debtor cannot maintain an ongoing nuisance in direct violation of state environmental laws. The state can exercise its regulatory powers and force compliance with its laws, even if the debtor must expend money to comply. Under Kovacs, what the state cannot do is force the debtor to pay money to the state; at that point, the state is no longer acting in its role as regulator, it is acting as a creditor." [Torwico, 8 F.3d at 150].

Under the statutes involved in this case, New Jersey does not have the authority to accept money in place of performance from petitioner and then perform petitioner's obligations under ECRA and RCRA itself. In Kovacs, Ohio had already performed the cleanup and was merely trying to recover its costs. Ohio was a creditor of Kovacs'. In this matter, New Jersey is a regulator of all "industrial establishments" subject to ECRA and RCRA.

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[8] Petitioner points out that Ohio, like New Jersey, "also argued that it was seeking the performance of some action and not the payment of money." Pet. Brief at 15. However, here New Jersey is actually seeking performance, whereas Ohio was only seeking money.

The definition of a "claim" at 11 U.S.C. 101(5) is as crucial to the opinion in Kovacs as the particular circumstances of that case. Notably, the phrase "right to payment" is included in both paragraphs of the definition. See, 11 U.S.C. 101(5).[9] It is this "right to payment" that is missing from petitioner's obligations under ECRA and RCRA. Consequently, Torwico's regulatory requirements under those laws are not dischargeable "claims" under the Bankruptcy Code.

It was this "right to payment" which Ohio both had and endeavored to enforce that allowed the Court to determine that Ohio's injunction was no more than a money judgment. The Court stated, "At oral argument in this Court, the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money." 469 U.S. at 283.

In Kovacs, the debtor's lack of possession of the property in question was physical, legal and irreversible because, following the appointment of a receiver, Ohio undertook to perform the needed cleanup work itself. Since the debtor's lack of possession of the property constituted a real (and insurmountable) reason why the debtor could not perform the required cleanup work itself, the lack of possession tended to highlight the fact (conceded by the

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[9] (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. [11 U.S.C. §101 (5) Emphasis Added].

State of Ohio at oral argument) that Ohio was seeking only to enforce a monetary obligation.

In this case, by contrast, petitioner is not only physically able to gain access to the site to perform the needed cleanup work, petitioner is under a state court obligation to do so (Ja353-Ja354).[10] Furthermore, the landlord, George Allen Associates, has a legal obligation to grant petitioner access to the site to comply with ECRA, even if he had not obtained that court order or did not wish petitioner to return. The regulations found at N.J. Admin. Code 7:26B-1.12(b)(2), require a landlord or property owner to grant such access and remedies are provided by the ECRA amendments at 1993 N.J. Law, 139, section 40, if such access is not readily granted.

Despite the expressly narrow holding of Kovacs, petitioner construes that decision to apply to any action brought by a state agency to enforce an environmental obligation where a debtor cannot comply with the obligation without paying money. The Court of Appeals correctly rejected this reading of Kovacs, which has the dangerous potential of making bankruptcy law a haven for polluters. As this Court has held before, "[c]ongress has repeatedly expressed its legislative determination that the trustee is not to have carte blanche to ignore nonbankruptcy law....Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety." Midlantic, 474 U.S. at 502.

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[10] It should be noted that the Bankruptcy Court is required to give preclusive effect to that state court judgment. In re Rosemarie Brown, 951 F.2d 563 (3d Cir. 1991). At a minimum, therefore, Torwico must be considered to be in constructive possession of the site in question. See also, In re Morristown and Erie R. Co., 885 F.2d 98 (3d Cir. 1989) (11 U.S.C. §105 may be used by the Bankruptcy Court to enforce provisions in debtor's lease or contract of sale).

B. In Chateaugay, The Second Circuit Also Held That Kovacs Does Not Support The Position That Petitioner Is Advocating.

In Chateaugay, the EPA had issued an order under §106 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. §9601 et seq., requiring a debtor to take certain cleanup actions. In addition, the EPA had filed a proof of claim for $32 million for expenses it had itself incurred under §107 of CERCLA in cleaning up contamination caused by the debtor. EPA contended that the debtor's obligation to comply with the cleanup order and to repay EPA's incurred expenses were not subject to discharge in bankruptcy.

The district court found the $32 million in response costs incurred by EPA to be a dischargeable claim. 944 F.2d at 1000. The district court further found that even claims for injunctive relief would be dischargeable if the injunctive remedy was an option EPA was electing to pursue, instead of incurring cleanup costs itself and thereafter seeking reimbursement. On the other hand -- and of direct importance here -- the district court concluded, "where there is no right to such payment for cleanup or other remedial costs, claims for injunctive relief do not fall within the Bankruptcy Code and are not dischargeable." Id. (emphasis added).

The Second Circuit, on appeal, gave close consideration to the Court's decision in Ohio v. Kovacs, and found that,

> to the extent that an order is obtained under CERCLA or any other environmental statute that seeks to end or ameliorate pollution, we are satisfied that nothing in Kovacs

> permits a discharge of such obligation [Chateaugay, 944 F.2d at 1009].

The court in Chateaugay concluded that Kovacs turned on the fact that a receiver had been appointed in that case, thereby precluding Kovacs from taking any steps to comply with the injunction in question, and restricting the State's legal options to obtaining monetary relief. Chateaugay, 944 F.2d at 1008-09. This reading of Kovacs gives full effect to the plain text of the opinion, in which the Court emphasized the narrowness of its holding. As the Second Circuit itself noted, its reading of Kovacs is also entirely consistent with Midlantic's holding that the Bankruptcy Code does not entitle a debtor to abandon property in violation of an environmental regulation "that is reasonably designed to protect the public health or safety from identified hazards." Chateaugay, 944 F.2d at 1009.

As the Second Circuit stated, "[i]t is difficult to understand how any injunction directing a property owner to remedy ongoing pollution could be a dischargeable 'claim' if, as Kovacs instructs, the owner 'may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.'" Id. (citations omitted). Petitioner rejects this straightforward and legally sound reading of Kovacs, and instead interprets that opinion to create a gaping exception to generally applicable environmental laws. This interpretation of Kovacs cannot withstand scrutiny.

C. The Court Has Rejected The View That A Claim Arises Merely Because A Debtor Must Expend Money To Meet Its Ongoing Regulatory Obligations.

Petitioner's contention that when a debtor in bankruptcy cannot clean up environmental contamination himself or itself without paying money, the obligation to clean up pursuant to an injunction is a debt which is dischargeable in bankruptcy, renders the government's police power exemption for enforcement actions meaningless. This Court has rejected this assertion by expressly declining to disapprove of or overrule Penn Terra Ltd. v. Dept. of Environmental Resources("DER"), 733 F.2d 267 (3d Cir. 1984), which held that, simply because an injunctive action will require the debtor to expend funds, the action is not one to enforce a money judgment. The Third Circuit had aptly stated, "in contemporary times, almost everything costs something." 733 F.2d at 277. In Kovacs, this Court stated:

> [In Penn Terra] the Court of Appeals for the Third Circuit held that the automatic stay provision of 11 U.S.C. §362 did not apply to the State's seeking an injunction against a bankrupt to require compliance with the environmental laws. This was held to be an effort to enforce the police power statutes of the State, not a suit to enforce a money judgment. But in that case, there has been no appointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt. The automatic stay provision does not apply to suits to enforce the

> regulatory statutes of the State, but the enforcement of such a judgment by seeking money from the bankrupt - what the Court of Appeals for the Sixth Circuit concluded was involved in this case - is another matter. [469 U.S. at 283, n.11.]

This Court's deliberate preservation of the Penn Terra holding makes clear that the Court of Appeals' decision in this matter was entirely in accord with Kovacs.

Furthermore, this Court effectively reaffirmed the Third Circuit's holding in Penn Terra recently in Board of Governors of the Federal Reserve System of the United States v. MCORP Financial, ___ U.S. __, 112 S.Ct. 459 (1991), in which the Court found that although enforcement proceedings might ultimately affect the Bankruptcy Court's control over the property of the estate, "that possibility cannot be sufficient to justify the operation of the stay against an enforcement proceeding that is expressly exempted by subsection (b)(4). To adopt such a characterization of enforcement proceedings would be to render 11 U.S.C. 362 (b)(4)'s exception almost meaningless."

This holding is identical to that in Penn Terra: just because compliance will require the debtor to expend money, an enforcement action is not subject to the automatic stay. Thus, it is clear that "Congress did not intend for the Bankruptcy Code to preempt all state laws," Midlantic, 474 U.S. at 505, which is what petitioner is advocating when it contends that if compliance with a law will require the debtor to spend money, then that law is unenforceable in bankruptcy. Were petitioner correct in asserting that any order which requires the expenditure of money is a dischargeable claim, "then the exception to section 362 for government police action, which should be

construed broadly, would instead be narrowed into virtual nonexistence." Penn Terra, supra, 733 F.2d at 277-78.

II. The Third Circuit's Decision Does Not Conflict With The Decisions Of Other Circuits.

The opinion below does not conflict with the Second Circuit's opinion in Chateaugay or with the Seventh Circuit's opinion in Matter of CMC Heartland as petitioner alleges. Ironically, the Third Circuit relied in part on both of these decisions to form its own conclusions: "We find CMC and Chateaugay to be both persuasive and consistent. Applying the precepts outlined in those cases to the situation here present leads us to conclude that Torwico's obligations under the administrative order do not constitute a claim." Torwico, 8 F.3d at 150..

A. The Second Circuit's Decision In Chateaugay Is Entirely In Accord With The Third Circuit's Decision In Torwico.

As noted above, in Chateaugay, the EPA had issued an order under §106 of CERCLA, requiring the debtor to take certain cleanup actions as well as an order for $32 million in expenses that the EPA had itself incurred under §107 of CERCLA in cleaning up contamination caused by the debtor. The district court found the $32 million in response costs incurred by EPA to be a dischargeable claim, 944 F.2d at 1000, but concluded, "where there is no right to such payment for cleanup or other remedial costs, claims for injunctive relief do not fall within the Bankruptcy Code and are not dischargeable." Id. The district court

> expressly rejected [the debtor's] contention that an injunction provision should be dischargeable "merely because the debtor would be

> required to expend money in order to comply with the injunction," ... and observed, "To accept that argument would render dischargeable any claims for injunctive relief other than those merely seeking the cessation of some unlawful activity. Such a reading would render the right to payment language set forth in the statute superfluous and would thus hardly be consistent with congressional intent." [944 F.2d at 1000].

On appeal the Second Circuit affirmed. Judge Newman, writing for the court, held that a cleanup order issued under §106 of CERCLA "no matter how phrased, [that] requires [a debtor] to take any action that ends or ameliorates current pollution ... is not a 'claim'." 944 F.2d at 1008. "Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a 'claim.'" 944 F.2d at 1008.

The reasoning and result of Chateaugay apply with direct force here and demonstrate the correctness of the decision of the court below. ECRA, like §106 of CERCLA, has no "alternate payment remedy," by which the State can perform a cleanup and later seek reimbursement from the polluter.[11] Torwico's obligation, as

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[11] On the other hand, the Spill Compensation and Control Act("Spill Act"), N.J. Stat. Ann. 58:10-23.11 et seq., like §107 of CERCLA, does have such an alternate remedy in some cases. On page 21 of the petition, petitioner writes at note 20, "Significantly, the law to which the Third Circuit referred is the Spill Act, which the state did not invoke as authority for its administrative order but which does provide the State with the right to recover cleanup costs." The court was not referring to the

the operator of an industrial establishment, to ameliorate the pollution at its former site of operations and thereby halt the migration of the plume of contaminated water that is approaching a potable water supply, does not differ in any legally material way from the type of cleanup order that the Chateaugay Court found to be nondischargeable.

B. The Decision Of The Seventh Circuit In CMC Heartland Is In Accord With The Decision In This Matter.

Similarly, the decision in Matter of CMC Heartland Partners, is not in conflict with the decision in this case. In Heartland, the Seventh Circuit discharged CMC of all obligations as an operator under §106 as well as §107 of CERCLA because this case was filed under the prior bankruptcy law, the Bankruptcy Act of 1898.

There was no "right to payment" language in the definition of a "claim" under the 1898 Act and the United States had failed to file a proof of claim, so even CMC's obligations as an operator under §106 where there is no "right to payment," were discharged.[12] However, the Seventh Circuit ruled that the newly organized corporation that emerged from bankruptcy was now responsible for the cleanup as the new owner of the site because CERCLA claims run with the land. Matter of CMC, 966 F.2d at 1147. Here, too, the Seventh Circuit found that Kovacs

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Spill Act, but to RCRA when talking abut disposing of hazardous substances. Torwico, 8 F.3d at 151. The State has no authority to issue administrative orders to comply with RCRA under the Spill Act, which is why the State did not invoke the Spill Act.

[12] The entire definition of a "claim" under the 1898 Act was "[t]he term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." 11 U.S.C. §205(b)(1978 ed.).

required such an outcome, asserting as it did that only when "environmental loss" has been "monetized" by the conclusion of the bankruptcy case does it constitute a claim that may be discharged. Id.

C. The Sixth Circuit's Decision In Whizco Goes Beyond Kovacs And Is Based On Its Own Facts Which Are Distinguishable From Torwico.

In United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988), the United States had sought to compel a coal company and the coal company's operator to satisfy their statutory obligations to reclaim an abandoned coal mine under the Surface Mining Control and Reclamation Act, ("SMCRA"), 33 U.S.C. §§ 201 et seq. The Sixth Circuit granted an injunction with respect to the corporate debtor, but not with respect to the individual operator in his Chapter 7 personal bankruptcy[13]. The court found that to the extent that the individual operator would have to spend money or be granted access to the site (from which he was barred) in order to comply with the injunction, it was discharged. To the extent that the individual could comply with the injunction himself it was not discharged. This debtor like the debtor in Kovacs had been dispossessed of the site and barred from entry - he did not have the right to enter upon the reclamation site. 844 F.2d at 149. Cf. Torwico, 8 F.3d at 151.

In contrast to the individual debtor in Whizco who was discharged from his legal obligations under federal law, the petitioner here is a corporate debtor, liquidating under Chapter 11 of the bankruptcy code who, just like the corporate debtor in Whizco, is not entitled to any discharge,

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[13] It should be noted that the debtors in both Kovacs and Whizco were individuals entitled to discharge under Chapter 7 of the Bankruptcy Code.

whether of an "obligation" or a "claim". See, 11 U.S.C. 1141(d)(3); see, also, p.6, at note 1, supra. The Sixth Circuit in Whizco, in discussing Kovacs, agreed that the State of Ohio had converted its equitable remedy into a "right to payment" and only wanted money from Kovacs. 844 F.2d at 149-50. The court cited In re Aslan, 65 B.R. 826, 830-31 (Bankr. C.D. Cal.1986)("If the only remedy allowed by law is nonmonetary, the equitable remedy is not transformed into a claim."). Id. The court then acknowledged the limited character of the Kovacs holding and admitted that it was extending Kovacs. Although the facts in Whizco are easily distinguishable from those of Torwico, this case would not present a conflict warranting this Court's intervention in any event because this opinion has had no impact, and has been widely criticized by other circuits.[14]

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[14] It appears that only one case has followed Whizco, while both the Second and Third Circuits have expressly criticized this decision. See, Chateaugay 112 B.R. at 523; United States v. Hubler, 117 B.R. 160, 164 (W.D. Pa. 1990) affirmed without opinion, 928 F.2d 1131 (3d Cir. 1991). But see In re Daniels, 130 B.R. 239 (E.D. Ky. 1991). Daniels is the only reported case to have followed Whizco and it does so only by stating that while "several courts have indicated disagreement with Whizco, this Court is required to follow the Sixth Circuit." Id. at 241. The Court then proceeded to find that by not complying with the law requiring the reclamation of coal mining lands, the action of the debtor constituted a wilful and malicious injury and was therefore excepted from discharge under 11 U.S.C §523(a)(6); see also, Phipps v. Kentucky, 980 F.2d 730(table only; text found at 1992 WL 358480)(6th Cir. 1992) (unpublished) (mining reclamation obligations of individual debtor owed to state were excepted from discharge under Code §523(a)(6) (willful and malicious injury to another entity or that entity's property, even though property did not belong to state). Therefore, if a debtor filed a petition in Cleveland, the end result would be the same as if he filed in Pittsburgh -- contrary to the allegations of petitioner. (Pet. Brief at 18). Perhaps in Cleveland, the court might simply find a different rea..n to insure the same result as in Pittsburgh.

D. Other Courts Of Appeals Decisions Are Not In Conflict With The Third Circuit's Opinion In This Case.

Nor is there any conflict with the Ninth Circuit's decision in re Dant & Russell, Inc., 853 F. 2d 700 (9th Cir. 1988). Dant & Russell did not involve a state attempting to enforce its laws within its police powers for the protection of the public health and safety. It involved a landlord suing a tenant for the full costs of cleaning up property contaminated by the debtor during the course of an expired lease. Again, like Ohio in Kovacs, this landlord only wanted money. It was not a government unit enforcing a law that required performance, for which money could not substitute -- or an obligation which does not give rise to a right to payment.

In fact, the Third Circuit in Southern Ry. Co. v. Johnson Bronze Co., 758 F.2d 137 (3d Cir. 1985) where a private party who cleaned up sewage sludge from the property of another private party and then, like the State of Ohio in Kovacs, sought to recover its costs -- or in other words, a money judgment -- is noticeably in accord with the Ninth Circuit. Southern Railway, too, is plainly distinguishable from the situation in Torwico and the Third Circuit was in accord with the Ninth Circuit when it ruled that the creditor in that case was clearly seeking payment of a general unsecured claim.

Nor is there any conflict between Torwico and In Re Jensen, 995 F.2d 925 (9th Cir. 1993). Jensen involves two individuals in a Chapter 7 bankruptcy who were discharged from all prepetition obligations and their case closed in 1985. The Jensens were responsible for ten percent of $900,000 spent by the California Department of Health Services ("DHS") to clean up a multi-generator site. The DHS argued that its claim arose post-petition, when the

DHS performed the clean up and obtained a "right to payment". If this theory had prevailed the DHS "claim" against the Jensens for $90,000 would not have been discharged. The Ninth Circuit, however, ruled that the claim arose prepetition - at the time of the release of the hazardous substances - and that therefore the claim was discharged. Jensen, 995 F.2d at 930-931. It is indisputable that Dant & Russel, Southern Railway, Jensen, and Kovacs all involved a clear cut "right to payment" of nothing more or less than money owed to a "creditor" for one reason or another -- even though sometimes the creditor was a government unit. In this case, it is just as clear that the government unit is a regulator without a right to payment and that therefore petitioner's environmental obligations are not dischargeable claims.

III. Although This Court Has Repeatedly Held That The Definition Of "Claim" Should Be Broadly Construed To Include All Legal Obligations Of The Debtor It Has Never Construed A "Claim" As Including Obligations That Do Not Involve A "Right To Payment."

The cases cited by petitioner, Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 588 (1990) and Johnson v. Home State Bank, __ U.S. __, 111 S. Ct. 2150 (1991), neither conflict with the decision below nor justify the Court's granting this petition. Petitioner cites Davenport for the proposition that the term "claim" should be construed broadly. (Pet. Brief at 11). But that case involved criminal restitution payments of money, and does not indicate, as petitioner suggests, that a "claim" can exist without a "right to payment." No matter how broadly the term is interpreted, no one would argue that it need not include a right to payment. Neither the State, nor the Court of Appeals in Torwico, has suggested that a "claim" need not be construed broadly. Nor is the State characterizing petitioner's obligations to the State as outside the definition

of a "claim" due to any unique characteristics of those obligations as Pennsylvania did in Davenport. The State is maintaining that the obligation to comply with ECRA and RCRA is not a claim because these obligations do not give rise to a right to payment, as the definition of a "claim" requires and as every obligation in every case that petitioner alleges a conflict requires as well.

Nor does Johnson dispute this interpretation - in fact, the entire opinion relies on the "right to payment" provided by a mortgage to find that the bank had a "claim" against the debtor's property: "Even after the debtor's personal obligations have been extinguished, the creditor still retains a "right to payment" in the form of its right to the proceeds from the sale of the debtors property." 111 S. Ct. at 2151. The opinion of the Court of Appeals does not conflict in any way with these decisions of this Court and, therefore, does not require this Court to grant this petition.

IV. Petitioner Is Asking This Court To Rule On A Hypothetical Situation In Its Discussion Of Chapter 11 Reorganization Because Torwico Is Not Reorganizing, But Liquidating.

Perhaps most important of all, petitioner is engaging in speculation and is asking this Court to grant certiorari to rule on its hypothetical situations. Petitioner, throughout its brief, repeatedly refers to Chapter 11 reorganizations and what might be the result of nondischargeable environmental obligations to a reorganized[15] and operating debtor -- when

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[15] Regardless of petitioner's doom and gloom predictions as to the effect on reorganization if a debtor must "spend money" to comply with the law, 28 U.S.C. 959(b) requires the debtor to operate in compliance with state law and does not mandate that this requirement is null and void if it costs the estate money.

this matter involves a debtor who has sold its business and is therefore not operating, but liquidating.

The Court of Appeals correctly rejected the view espoused by petitioner that would replace the compliance of private citizens with local public health and safety regulation - with government action. The petitioner erroneously asserts that the opinion below undermines the basic policies of the Bankruptcy Code, the debtor's 'fresh start' and equal treatment for all creditors. (Pet. Brief at 24-25). "The funds a debtor is forced to expend to comply with an environmental agency's order--for example, to remediate a landfill to which the debtor shipped waste years prior to the bankruptcy --will be unavailable to pay the claims of lenders, suppliers, contractors, workers, retirees, tort victims, and other legitimate claimants."[16] Id. at 25. These contentions are without merit.

The petitioner had a legal obligation to operate its potentially hazardous business in accord with applicable police power regulations enacted to protect the public. These legal responsibilities and the concomitant financial obligations associated with compliance significantly increased the risk of petitioner's insolvency and of the erosion or destruction of the collateral to which a lender's

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[16] This, of course, is absurd on its face because the regulatory obligations required here have nothing to do with remediating landfills, nor is this site a multi-generator site as petitioner erroneously suggests or even a site where anyone except the petitioner has ever operated. Petitioner suggests that the State could order the cleanup of a landfill, citing CERCLA §107 (a)(3), 42 U.S.C. §9607 (a)(3). This statute has nothing to do with this case. Moreover, as indicated in Chateaugay, §107 of CERCLA does have an alternate payment remedy. Whether resort to an alternate payment remedy under CERCLA is a dischargeable claim in bankruptcy is not an issue in this case.

security interest might attach. Had petitioner complied with the environmental laws to the fullest of its ability prior to the filing of its bankruptcy petition, the estate funds that petitioner wishes to protect may very well have been exhausted and never become part of the estate anyway. No creditor can be insulated against all business risks as petitioner suggests. As this Court has previously recognized, "it is a fundamental aspect of our free enterprise economy that private persons assume the risk attached to their investments," New Haven Inclusion Cases, 399 U.S. 392, 492 (1970), quoting Penn-Central Merger Cases, 389 U.S. 486, 510 (1968).

Petitioner talks about not thwarting a debtor's reorganization, but in this matter, the debtor is not reorganizing -- it has sold its business and is liquidating -- and therefore nothing is dischargeable. In fact all of petitioner's arguments about the dangers of nondischargeability rarely will apply to a corporate debtor, who is only granted a discharge if reorganizing. 11 U.S.C. 1141 (d)(3). On the other hand, by not requiring a reorganizing debtor to comply with regulations that apply to nondebtors, petitioner is espousing a system that will afford a commercial advantage to a debtor in a Chapter 11 reorganization at great cost to the public. Requiring a debtor to comply with environmental obligations is not "an act" directed at possession or control of the property of the estate. To permit the debtor to walk away from its legacy of pollution as petitioner suggests, because it requires expenditures of estate assets, would permit the debtor to operate in violation of the law and would give the reorganizing debtor a competitive advantage over others -- something Congress clearly did not intend. See, K. Heidt, The Automatic Stay in Environmental Bankruptcies, 67 American Bankr. L. Journal 70, 87.

By maintaining that the state should use public funds under other statutes to perform any necessary cleanup on

petitioner's site, petitioner is advocating a practice whereby the debtor "seeks a fresh start with someone else's property." See, In re Sanderfoot, 899 F.2d 598, 608 (7th Cir. 1990)(Posner, J. dissenting) rev'd __ U. S. __, 111 S.Ct. 1825 (1992). Only in the present case "someone else's property" is the public's money or the public health and welfare. The Third Circuit correctly refused to countenance that result in this case.

CONCLUSION

For all of the foregoing reasons, the State of New Jersey, Department of Environmental Protection and Energy, requests that this Court deny the petition for a writ of certiorari.

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1993

TORWICO ELECTRONICS, INC., *Petitioner*
v.
STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit

BRIEF OF KATHRYN R. HEIDT *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should the lower courts, in analyzing the dischargeability in bankruptcy of environmental cleanup obligations, be required to follow the analytic framework of the Bankruptcy Code and thereby strictly separate the questions of whether an obligation is a "claim" from the question of when the obligation "arose?"

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INTEREST OF *AMICUS CURIAE*

Kathryn R. Heidt is a law professor at Wayne State University Law School in Detroit, Michigan. She teaches bankruptcy law, corporate reorganizations and commercial law. She has written extensively on the intersection of bankruptcy and environmental law. She is the author of the treatise ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (1993) as well as several law review articles on the subject. She speaks regularly to judges, practicing lawyers and law professors on the subject. She hopes that she can bring to these proceedings a perspective that is broader and may take into account more interests that those represented by the parties. Those interests and perspectives are more fully set out in the "Motion for Leave to File as *Amicus Curiae* in Support of Certiorari," filed with and attached to this brief at its conclusion. A detailed list of her publications and her speaking engagements are set forth in her *curriculum vitae*, a copy of which is attached to that Motion.

STATUTES INVOLVED

Section 101(5) of the Bankruptcy Code, (11 U.S.C. § 101(5)) provides:

> "claim" means --
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

Section 101(12) of the Bankruptcy Code, (11 U.S.C. § 101(12)) provides:

> "debt" means liability on a claim;

Section 727(a)(1) of the Bankruptcy Code, (11 U.S.C. § 727(a)(1)) provides:

> (a) The court shall grant the debtor a discharge unless --
>
> (1) the debtor is not an individual;

Section 727(b) of the Bankruptcy Code, (11 U.S.C. § 727(b) provides:

> Except as provided in section 523 of this title, a discharge granted under subsection (a) of this section discharges the debtor from all debts that arose before

the date of the order for relief [the date of the petition in a voluntary bankruptcy case] under this chapter, ...

Section 726(b) of the Bankruptcy Code, (11 U.S.C. § 726(b) provides, in part:

> (b) Payment of claims of a kind specified in [specified paragraphs, which include general unsecured claims] shall be made pro rata among claims of the kind specified in each particular paragraph, ...

Section 507(a) of the Bankruptcy Code, (11 U.S.C. § 507(a) provides in part:

> (a) The following expenses and claims have priority in the following order
>
> ...

Section 523(a) of the Bankruptcy Code, (11 U.S.C. § 523(a) provides in part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> (5) [alimony, child support, etc]
>
> (8) [educational loans]

Section 1141(d)(1) of the Bankruptcy Code, (11 U.S.C. § 1141(d)(1) provides:

> Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan --
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation, ...

SUMMARY OF ARGUMENT

The United States Courts of Appeals are irreconcilably divided on the question of how to analyze and decide the issue of whether an environmental clean up obligation is dischargeable in a bankruptcy proceeding.

The Court of Appeals for the Third Circuit below held that an obligation to clean up a contaminated site not currently owned or operated by the debtor was not a "claim," was not a "debt," and therefore was not dischargeable in bankruptcy. *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3rd Cir. 1993). The decision contravenes important provisions of federal law: 1) it overrides the priority of claims established by Congress in the Bankruptcy Code and 2) it negates the "fresh start" provided for by Congress in the Bankruptcy Code.

There are two "types" of conflicts among the courts of appeals. The first concerns whether an injunction or other order directing the debtor to cleanup, when the debtor is the former occupant of the property, is a "claim" within the meaning of the Bankruptcy Code. It is typified by the decision in the court below. That decision is in direct conflict with a decision of the Court of Appeals for the Sixth Circuit, which decided a case with virtually identical facts. *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988).

The second type of conflict concerns the analytic approach taken by the courts of appeals in attempting to decide the dischargeability of environmental cleanup obligations in bankruptcy. This second type of conflict is also is also typified by the decision below. In this regard, the decision below is in conflict with that of several other courts of appeals. The complexity of issues that arise at the intersection of bankruptcy

and environmental law have resulted in a split among the courts of appeals in how they address, analyze and resolve the matters of environmental obligations in bankruptcy. Due to the many approaches taken by the courts, there is no uniformity of analysis at the intersection of these two important bodies of law. Guidance is needed from this Court on this important federal matter.

Petitioner's Petition addresses the first type of conflict. This brief addresses the second type of conflict in the courts of appeals -- that of the proper way to analyze the dischargeability of environmental obligations in bankruptcy. This brief focuses on the lack of a unified approach among the courts that results in such inconsistent and conflicting results.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON HOW TO ANALYZE THE DISCHARGEABILITY OF AN ENVIRONMENTAL CLEANUP OBLIGATION IN BANKRUPTCY

Although the Bankruptcy Code and the environmental laws regulating hazardous substances were enacted at roughly the same time, they are not well coordinated.[1] As a result there

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1. The Bankruptcy Code went into effect in 1979. At the federal level, the Comprehensive Environmental, Compensation and Recovery Act ("CERCLA" or "Superfund")

is widespread confusion in the courts and a conflict among the courts of appeals regarding how to analyze and decide those issues.

The decision in this case is but one of several that show widespread confusion among the courts regarding the dischargeability of environmental obligations in bankruptcy. The intersection of bankruptcy and environmental law has resulted in a conflict among the courts of appeals in how they address, analyze and resolve these cases. The writ of certiorari should be granted to resolve the conflict and provide much needed guidance to the courts of appeals and lower federal courts.[2]

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was enacted and went into effect in 1980.

2. Although this case involves a corporation that was liquidating, and therefore does not technically need a discharge because it will cease to exist, the scope of the decision is much broader. The decision of the Court of Appeals for the Third Circuit affects all types of debtors and all types of bankruptcy cases. The decision is premised upon incorrect interpretations of the technical term "claim" and "debt" as used in the Bankruptcy Code. The definitions of "debt" and "claim" apply to all cases under the Code and do not depend on whether the debtor is a corporation or an individual, or is liquidating or reorganizing.

A. Whether an obligation is dischargeable in bankruptcy depends on two issues: 1) whether the obligation is a "claim" and 2) when it "arose," two issues that are often confused by the courts of appeals, including the court below, in determining the dischargeability of an environmental cleanup obligation.

While environmental laws place the responsibility to clean up on both current owners and on former owners, it is a fundamental tenet of bankruptcy law that the past is to be separated from the future. Liability based solely on past ownership will not survive bankruptcy. Liability based on being a current owner or operator will, however, arise again and again every day until satisfied. It will survive bankruptcy. In sum, the Bankruptcy Code will discharge obligations that arise solely in the past but not those that continue to arise in the future.

At a technical level, the Bankruptcy Code only discharges "debts" that "arose" before a specified time. 11 U.S.C. §§ 727(b), 1141(d). In a Chapter 11 reorganization an obligation will be discharged if it fits within the Bankruptcy Code definition of "debt" and it "arose" before the plan of reorganization is confirmed by the court. 11 U.S.C. § 1141(d)(1).

The Bankruptcy Code defines a "debt" as a "liability on a claim." 11 U.S.C. § 101(12). Thus, only obligations that are within the definition of "claim" are "debts" and therefore subject to the bankruptcy discharge. The definition of "claim" includes

two sorts of obligations.[3] It includes rights that are legal in nature, i.e., those which are for damages, for money. It also includes rights to equitable remedies *if* the breach of the obligation that gave rise to the remedy also gives rise to a right to payment.

Whether an obligation is dischargeable thus depends on two things, which the courts tend to confuse:

1) whether the obligation is a "debt" within the meaning of the Bankruptcy Code (the "definitional" issue), and

2) whether the obligation "arose" before a certain time (the "timing" issue).[4]

---

3. Section 101(5) provides:

"claim" means --

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

4. One additional factor complicates some of the cases: whether the creditor knew or should have known about the obligation. Lack of knowledge that a debtor might be responsible for an environmental obligation gives the courts pause: can a debt be discharged if the creditor (and possibly the

Courts often confuse these two issues.[5] For example, the Court

---

debtor) did not even know it existed? Again, there is no uniformity in the analysis applied by the courts. Some courts incorporate the element of notice or knowledge into the definition of "claim," others incorporate it into the timing element, still others use it as an independent basis on whether a discharge can be granted. *See, e.g., In re Jensen*, 995 F.2d 925 (9th Cir. 1993) (claim was discharged since government had sufficient knowledge about it). In *Jensen* the Bankruptcy Appellate Panel had previously held that a claim could exist although all of the elements of the environmental obligation had not yet occurred -- specifically, the government had not yet "incurred" any costs, a prerequisite for bringing suit under CERCLA. *In re Jensen*, 127 B.R. 27 (9th B.A.P. 1991). *See* also *CMC Heartland Partners v. Union Pacific Railroad*, 3 F.2d 200, 207 (7th Cir. 1993) (claimant had sufficient knowledge for a claim to arise before the bar date for filing claims), *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 974 F.2d 775, 786 (7th Cir. 1992) (CERCLA claim existed when the claimant can tie the debtor to a known contamination and the claimant had in fact conducted tests with respect to the property), *U.S. v. Union Scrap Iron & Metal*, 123 B.R. 831 (D. Minn. 1990), *In re Sylvester Bros. Dev. v. Burlington N. RR.*, 133 B.R. 648 (D. Minn. 1991), *Waterville Indus. v. First Hartford Corp.*, 124 B.R. 411 (D. Me. 1991). The court in *Chateaugay*, discussed below, also incorporated a requirement of some notice into its final determination of whether the obligation was dischargeable.

5. *See*, Kathryn R. Heidt, *Environmental Obligations in Bankruptcy: A Fundamental Framework*, 44 Florida L. Rev.153 (1992) for an early argument that the Bankruptcy Code requires that these issues be separated and for a framework for

of Appeals for the Third Circuit below premised its decision, in part, on the decisions of two other courts of appeals. One of those courts properly separated the timing issue from the definitional issue on the facts before it. The other cited court of appeals decision did not properly separate the two issues. The Court of Appeals for the Third Circuit likewise fails to do so.

For example, in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), discussed below, the court incorporated elements of timing into the definition of "claim." In *Chateaugay*, the court considered whether injunctions issued to the debtor to clean up contaminated sites were "claims." The court held that if the site was not currently causing pollution, then the injunction was a claim and would be discharged. However, if the injunction orders the debtor to take "action that ends or ameliorates current pollution, such an order is not a 'claim.'" Id. at 1008. In essence, the court held that cleanup obligations are not claims if cleanup will end or ameliorate current pollution. This is a timing issue, it is not part of the definitional question. The court could have decided the issue based on the timing issue. The court could have properly held that the cleanup obligation was a "claim" since CERCLA gives the government the option of ordering cleanup or cleaning up and then seeking reimbursement. Once established as a claim, the question then would be whether the claim arose pre-confirmation. In *Chateaugay*, the debtor was reorganizing and would continue to own and operate several steel plants that were located on contaminated property. As the continuing owner or operator of contaminated property, the reorganized debtor would be liable every day for cleanup under CERCLA.

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approaching these issues. *See also*, Kathryn R. Heidt, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY, Chapter 3 (1993).

Therefore, the claim would continue to "arise" every day until the property was cleaned up. The cleanup obligation would thus not be dischargeable.

In its zeal to find these hazardous sites outside the scope of the bankruptcy discharge, the court in *Chateaugay* needlessly added an element to the definition of "claim" (*i.e.*, an obligation is not a claim if it continues to cause harm). The same result could have been reached without changing the Code's definition but by simply applying the timing rules of discharge.

At least two courts of appeals have correctly separated the definitional and the timing issue. First, on virtually identical facts, the Court of Appeals for the Sixth Circuit based its decision on the definitional issue. *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988). Despite the virtual identity of facts and issues, the Court of Appeals for the Third Circuit fails to mention *Whizco*. In *Whizco*, the government did not have an alternative right to pursue a money obligation under the environmental statute concerned. Nonetheless, the court held that because the debtor would have to pay money to comply with the cleanup order, the obligation was a "claim." The conflict between the instant case and *Whizco* is patent. It is more fully discussed in Petitioner's Petition (pages 18-19).

Further, in *In re CMC Heartland Partners*, 966 F2d 1143 (7th Cir 1992) the court decided the issue of dischargeability based on the timing issue without confusing it with the definitional issue. In *CMC* the reorganized debtor continued to own the contaminated property. The court held that the government had both 1) a pre-petition claim for cleanup and 2) a post-reorganization claim against the debtor survived the debtor's bankruptcy ** discharge, since the debtor continued to own the contaminated property. As the Court of Appeals for the Seventh Circuit said: the liability "runs with the

land." Id. at 1147. That is, the environmental liability runs with the continued ownership of the contaminated land.[6]

In the instant case, the court below also confused the two issues of definition and timing. It applied cases that dealt with timing question to decide the definitional issue. The court interpreted both *Chateaugay* and *CMC Heartland* to decide whether Torwico's cleanup obligation was a "claim" within the meaning of Section 101(5)(B). As noted above, both of these cases involved the obligation to cleanup contaminated sites that the debtor *continued to own or operate* after the reorganization.[7] In the instant case, the debtor did not own the property in question and had apparently given back possession of the property to the lessor years earlier.

More importantly, the courts in both *Chateaugay* and *CMC* based their decisions on the timing issue. Both reached the correct result, despite the fact that the court in *Chateaugay* said it was deciding the definitional issues of whether the obligation was a claim. In *CMC Heartland* it was clear that the obligation was not discharged in the debtor's previous

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6. Under many environmental statutes, occupying or operating the contaminated land would also be sufficient. *See* 42 U.S.C. 9607(1).

7. In *Chateaugay* the debtor was not yet reorganized but would continue to own or operate certain contaminated properties post-reorganization. In *Chateaugay*, it is not as clear as in *CMC Heartland* that the dispute was over owned or operated properties. That is, the language used by the court in *Chateaugay* speaks in general terms about ameliorating ongoing pollution. But the facts indicate that the dispute was over properties that the debtor owned or operated.

reorganization. The debtor *continued to own the contaminated property*. Current environmental laws place cleanup responsibility on the current owner. The issue in *Chateaugay* was not so clearly framed, as noted above. Nonetheless, the real basis for the court's holding was timing: if the cleanup order would end pollution on the debtor's property it is not a claim.

The court below used these two cases to conclude that when a cleanup order will end pollution it is not a claim. A cleanup by Torwico would end the pollution. Thus, the court reasoned that the obligation was not a "claim."

The cleanup obligation below was within the plain meaning of the definition of "claim." The only question should have been when did the claim "arise?" The answer in this case is that the obligation arose pre-petition and pre-confirmation. All of the debtor's activities that gave rise to the obligation occurred in the past. The obligation therefore arose in the past. This is not like *CMC Heartland* or *Chateaugay* where the debtors continued to own or operate the contaminated property so that the obligation would arise again after the reorganization. The decision of the court below is in conflict with decisions of the Courts of Appeal for the Sixth and Second Circuits.

To summarize, the courts of appeals are divided on how they analyze whether a cleanup obligation is dischargeable. The Courts of Appeals for the Sixth and Seventh Circuits correctly respect the division between the definitional and timing issues. The Courts of Appeals for the Second and Third Circuits confuse the definitional and the timing issues. This confusion is a recurring problem in the courts that have considered whether an environmental obligation to cleanup is dischargeable in bankruptcy. The courts of appeals are divided on how to

properly apply the Bankruptcy Code to these environmental obligations. Guidance is needed from this Court.[8]

B. The cleanup obligation in this case was a "claim" because of 1) the plain meaning of the definition and 2) this Court's decision in *Ohio v. Kovacs.*

The court incorrectly interpreted the Bankruptcy Code. Its interpretation was wrong both at the technical level and at the policy level. At the technical level, the court did not apply the plain meaning of the Bankruptcy Code's definition of "claim." At the policy level (discussed below in Part I. D.) its interpretation interfered with two important bankruptcy policies: to treat similar creditors equally and to provide debtor's with a fresh start.

In the instant case the govement had a "claim" for two related reasons. First, the state had an alternative right to payment. Second, the state had a claim under this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985).

1. The State had a right to payment.

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8. Not only have the courts of appeals used conflicting analyses in deciding whether a particular environmental obligation is a "claim," the district courts and bankruptcy courts have likewise used conflicting analysis. *See e.g., In re National Gypsum Co.*, 139 B.R. 392 (N.D. Tex. 1992), *U.S. v. Union Scrap Iron & Metal*, 123 B.R. 831 (D. Minn. 1990). This further level of conflict and confusion over these federal issues further support the need for this Court to grant the writ of certiorari.

The obligation at issue is an order directing the debtor to cleanup property it once occupied as a lessee. On its face the order does not give the state a right to payment. Thus, the question is whether the state had a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, ..." If it did, the obligation is a "claim."

This Court has adopted a "plain meaning" approach to interpretation of the Bankruptcy Code. Rake v. Wade, __ US __, 113 S. Ct. 2187 (1993), Patterson v. Shumate, 112 S. Ct. 2242 (1992), Toibb v. Radloff, 111 S. Ct. 2197, 2199 (1991), Pa. Dep.'t Welfare v. Davenport, 110 S.Ct. at 2131 (1990), U.S. v. Ron Pair Enterprises, 489 U.S. 235 (1989). When the statute is plain, "'the sole function of the courts is to enforce it according to its terms.'" Ron Pair, 489 US at 241 (citations omitted).

The debtor breached an obligation here when it improperly disposed of hazardous substances. It breached another obligation when it failed to clean up. These obligations gave rise to two sorts of remedies, one equitable and one legal. Specifically, the state had the option to clean up the site and then to seek reimbursement from the debtor. The basis of this argument is more fully set out in Petitioner's Brief pp. 16-17. In essence, the state claims that it had no such right under the state statute pursuant to which it acted. However, the state did have an equivalent right to clean up the site under another state statute and then to seek reimbursement. The state may have also had the right to clean up under Section 104 the federal statute, the Comprehensive Environmental Response, Compensation and liability Act ("CERCLA") and then to seek

reimbursement.[9] Thus, the state had the right to an equitable remedy (to enjoin the debtor to cleanup the previously leased property and the state also had the right to clean up the property and then to seek reimbursement.

This alternative right to pursue a legal remedy makes the obligation a "claim" within the plain meaning of the Bankruptcy Code.

2. The obligation was a "claim" under this Court's decision in *Ohio v. Kovacs*.

Even if there was no alternative right to payment, the obligation is a "claim" under this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985).. In *Kovacs* an order had been entered under the state's environmental laws ordering the debtor, Mr. Kovacs, to clean up a site. The State of Ohio had no right to pursue the debtor for money in place of action. When Mr. Kovacs failed to comply, the state had a receiver appointed, pursuant to state law, who dispossessed the debtor from the property. This Court held that since the debtor was no longer in possession he could not perform cleanup but could only pay money. The obligation was therefore a "claim," was a "debt" and was dischargeable in Mr. Kovac's bankruptcy proceeding.[10]

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9. One other court has refused to rule that all such CERCLA obligation are "claims." *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991). As Petitioner argues that case is distinguishable from this case since the debtor thus owned much of the property in question.

10. For an in depth discussion of *Kovacs* and its effects *see*, Kathryn R. Heidt, ENVIRONMENTAL OBLIGATIONS IN

The instant case is virtually identical to the *Kovacs* case. In both cases the debtor had probably contaminated the site in question. In both cases the debtor had been ordered to clean up the site. In both cases the debtor neither owned, operated or occupied the site in question at the time of the bankruptcy.[11] In both cases the only thing the debtor could do to clean up the site was to pay money.

BANKRUPTCY ¶ 3.03[3][c][ii] (1993) at pages 3-25 to 3-28.

11. The court below distinguished *Kovacs* by saying that Torwico could gain access to the land. 8 F.3d at 151. However, 1) it is not at all clear that Torwico had access to the land (it had left the premises, which it had leased years before) and 2) it is not clear that the debtor did not have access to the land in *Kovacs*.

The court below also distinguished *Kovacs* by saying that in *Kovacs* the state was seeking money. 8 F.3d 151. The state had not actively sought money but had admitted in oral argument at the appellate level that it would be satisfied with money. While this Court did note this admission in the *Kovacs* opinion, this Court's holding rests squarely on the fact that the debtor was not in possession of the property and could only satisfy the obligation by paying money. Further, in all likelihood, New Jersey would also be satisfied with a payment large enough to cover the cleanup. The mere fact that one state admits a willingness to take money -- even when otherwise entitled to a pure equitable remedy -- while another scrupulously avoids seeking money in any form, should not control. This would allow creditors to turn dischargeable obligations into non-dischargeable ones at their whim.

Under *Kovacs*, the obligation of the debtor in this case was a "claim." As Petitioner's brief argues, to the extent the Court of Appeals for the Third Circuit held otherwise below, its decision conflicts with a decision of this Court. (Petitioner's Brief, pages 12-17).

3. The court incorrectly applied cases involving the timing issue to decide this definitional issue.

In the instant case, the court below confused the two issues of definition and timing. It applied cases that dealt with timing question to decide the definitional issue. The court interpreted both *Chateaugay* and *CMC Heartland* to decide whether Torwico's cleanup obligation was a "claim" within the meaning of Section 101(5)(B). As noted above, (Part I.A.) both *Chateaugay* and *CMC Heartland*of these cases involved the obligation to cleanup contaminated sites that the debtor *continued to own or operate* after the reorganization.[12]

The decision of this court conflicts with other courts of appeals on the method of analyzing and decising cases on this issue.

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12. In *Chateaugay* the debtor was not yet reorganized but had sought a declaratory judgment regarding the status of the cleanup obligations once it was reorganized and would continue to own or operate certain contaminated properties post-reorganization. In *Chateaugay*, it is not as clear as in *CMC Heartland* that the dispute was over owned or operated properties. That is, the language used by the court in *Chateaugay* speaks in general terms about ameliorating ongoing pollution. But the facts indicate that the dispute was over properties that the debtor owned or operated.

C. The effect of the decision below was to ignore the real parties in interest.

The court confused the debtor with its creditors. This is not an uncommon problem in cases dealing with similar issues. The court seemed to view the dispute as a contest between the government and the debtor. The problem, of course, is that once the debtor is in bankruptcy, the real parties in interest are the creditors. The dispute below is more properly viewed as one between one creditor (the government) and the other creditors. The case thus actually presents a question about the priority of payment to creditors and should have been decided with that focus. This incorrect focus led the court below to annul a fundamental bankruptcy policy: equality for similarly situated creditors, discussed below (Part I.D.2.).

D. The decision of the court of appeals is inconsistent with established, fundamental bankruptcy policies.

1. Efficiency and fairness are fundamental bankruptcy principles on which are based the bankruptcy policies of 1) the fresh start and 2) treating similar creditors equally are based.

Bankruptcy law serves many goals. One goal is to provide debtors with a fresh start. A second is to treat similar creditors similarly. The decision of the Court of Appeals violates both of these goals.

The idea of a "fresh start" in bankruptcy is well established in our bankruptcy system. It has been recognized on

many occasions by this Court. *See, e.g., Local Loan Co. v. Hunt*, 282 U.S. 234, 244-45 (1934). To accomplish the goal of the fresh start, the debtor receives a discharge of his, her or its debts. The honest individual debtor can then continue on with life. Corporations and other non-individuals receive a discharge only if they "reorganize."[13] The idea of a "fresh start" for corporations and other non-individuals is thus more appropriately viewed as "debtor rehabilitation," one of the Congressional goals of the Bankruptcy Code. S. Rep. No. 589, 95th Cong., 2d Sess. 9, reprinted in 1978 U.S.C.C.A.N. 5787, 5795. The corporation that reorganizes can continue on with its business, which in turn means it will continue to employ employees, buy supplies, pay taxes, and be a productive corporate citizen. Reorganization serves all of the efficiency goals of the bankruptcy laws described below and it also serves to protect a variety of interests: those of employees, the community, suppliers, and other groups that are not necessarily "creditors." *See*, Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775 (1987).

Key to the individual fresh start and the corporate rehabilitation is the discharge of the debtor's past debts.

A second goal of the bankruptcy system is to assure equality among similarly situated creditors: creditors with similar claims should share equally. Under the Bankruptcy Code, unsecured creditors share on a pro-rata basis.[14] This second goal is not only fair, it is efficient. Bankruptcy is generally

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13. Section 727(a)(1) denies a discharge in a Chapter 7 case to a non-individual debtor; Section 1141(d) grants a discharge to a debtor that reorganizes.

14. *See, e.g.*, 726(b).

viewed as an efficient response to widespread default. First, bankruptcy avoids duplication of costs. If creditors were forced to pursue the debtor in state court, each creditor would spend money on court costs, attorneys fees, and related costs. In addition, the debtor may use some of the limited assets to defend these suits -- money that would otherwise be available for ultimate distribution to the creditors. Second, in some cases, keeping debtor's assets together as a whole rather than selling them piecemeal may produce a greater recovery. Bankruptcy serves to preserve this potentially greater value of the debtor's estate by keeping the assets together.

As noted above, outside of bankruptcy, creditors are normally left to their state law remedies to pursue the debtor and to attempt to recover. Under the state law system, creditors can sue the debtor for a debt owed. As each creditor recovers, it can foreclose or execute on certain property of the debtor. The state system works so long as the debtor has the ability to pay its creditors. When the debtor does not have enough assets to pay all of the creditors, the first few creditors to "win the race to the courthouse" recover, and later creditors recover nothing. Under the state law system, therefore, creditors with similar types of claims, such as general unsecured creditors, would be treated very differently -- some would be paid in full and some not at all. Bankruptcy evens out this disparity and attempts to treat all similar creditors similarly. This is fair: Two identical creditors could be equally diligent in pursuing the debtor but one might prevail over the other in the state law system simply because of the random draw of a faster judge with a fast moving docket. It is also efficient: If all unsecured creditors could bargain in advance for the distribution of assets upon a massive default by the debtor, they would agree to a pro-rata distribution. Bankruptcy accomplishes this for them. *See*, Thomas H. Jackson, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 15-17 (1986).

2. The Decision of the Court of Appeals Violates Both Principles of Bankruptcy Policy

Congress established that all "claims" that "arose" before a particular time are to be discharged in bankruptcy. In the case of the individual debtor, Congress has provided a limited set of exceptions to this rule.[15] Absent these special circumstances individual debtors in all are entitled to a discharge. Corporations that reorganize under Chapter 11 also are entitled to a discharge.

By holding that the cleanup obligation in *Torwico* was not a "claim" or a "debt," the court effectively denies debtors a discharge when they would otherwise be entitled to discharge. The decision disregards the express provisions of the Bankruptcy Code. This rule now in effect in the third circuit (cleanup obligations are not "claims") will apply to deny the individual debtor a fresh start and to deny a corporation that does reorganize the ability to effectively reorganize.[16]

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15. Under Section 523(a) child support, most taxes educational loans and certain other debts are not dischargeable. An environmental obligation may be excepted from discharge if it fits within Section 523(a)(6) (willful and malicious acts) or (a)(7) (certain fines and penalties).

Under Section 727(a) a debtor can be denied a discharge altogether for engaging in certain fraudulent acts.

16. As noted earlier, Torwico is not reorganizing. It will not receive a discharge under the Bankruptcy Code since it is not reorganizing. The rule the case establishes, however, will apply to all bankruptcies.

The decision of the Court of Appeals for the Third Circuit also violates the principle of equality among creditors. Nothing in the state environmental law gives the State of New Jersey a right to be paid before other general unsecured creditors. Congress could have provided a special priority for environmental obligations. It has provided priority for certain employee wage claims, taxes and certain other obligations.[17] It has not given priority for environmental obligations. As noted by Justice O'Conner in her concurring opinion in *Kovacs*, the state can avoid the result of *Kovacs* by enacting a lien statute. In the future the state of New Jersey could possibly gain some priority by enacting a statute granting to itself a lien for environmental obligations.[18]

There is no basis on which to give New Jersey priority here. Yet, the effect of the decision of the court of appeals is to require that the assets of the estate be used to satisfy the government's obligation first, before all other obligations. This elevates New Jersey's obligation above the others. It is unfair and inefficient because it violates the bankruptcy principle that "equality is equity."

This obligation is no different from a whole variety of non-consensual obligations. For example, a victim injured in an accident by the debtor's delivery truck before a bankruptcy is filed, or an employee injured on the job before a bankruptcy is filed, each have claims that arose in the past. Their claims will be discharged in bankruptcy. There may be a current requirement to compensate those victims under applicable tort

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17. *See, e.g.*, 11 U.S.C. 507(a)(3) and (7).

18. New Jersey does in fact have an environmental lien law in effect. It evidently does not apply to this case.

law, just as there is a current obligation to clean up the previously occupied contaminated site, but the obligation arose solely out of past activity, not current activity. Unless there is some specific provision given to us by Congress, the usual priority rules apply -- unsecured creditors are treated equally. The decision in this case violates that principle.

SUMMARY

This cases raises important questions of federal law. There is no uniformity in the courts on the question of when an environmental cleanup obligation is dischargeable in bankruptcy. The courts continue to decide these cases using very different analyses. This Court should allow the writ of certiorari to issue in order to provide the much needed guidance on this important federal question.

CONCLUSION

The writ of certiorari should be granted.

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No. 93-1187

SUPREME COURT OF THE UNITED STATES

October Term 1993

TORWICO ELECTRONICS, INC., *Petitioner*
v.
STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* IN SUPPORT OF CERTIORARI

Movant, Kathryn R. Heidt, requests this court to allow her to file an *amicus curiae* in support of Petitioner's "Petition for Writ of Certiorari."

Movant sought the consent of both parties to filing. Petitioner has given its consent (see attached letter), but the State of New Jersey has not.

Movant is a law professor at Wayne State University Law School in Detroit, Michigan. She has written extensively on the intersection of bankruptcy and environmental law. She

is the author of the treatise ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (1993). Her other publications include: *The Changing Paradigm of Debt and Obligation*, Washington University Law Quarterly (forthcoming), *Environmental Claims in Bankruptcy: A Fundamental Framework*, 44 Florida Law Review 153 (1992), *Automatic Stay in Environmental Bankruptcies*, 67 American Bankruptcy Law Journal 69 (1993), *Liability of Shareholders Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")*, 52 Ohio State Law Journal 133 (1991), *Cleaning Up Your Act: Efficiency Considerations in the Battle for the Debtor's Assets in a Toxic Waste Bankruptcy*, 40 Rutgers Law Review 819 (1988). Movant teaches bankruptcy law, corporate reorganizations and commercial law.

Movant has also lectured frequently on the subject of environmental obligations in bankruptcy before a wide variety of audiences including audiences made up of federal judges (the 55th Judicial Conference of the Third Circuit: Moderator and Speaker, Baltimore, Maryland, April 1993.), bankruptcy teachers and scholars (Association of American Law Schools Annual Meeting, January, 1994, The Washington University Interdisciplinary Conference on Bankruptcy and Insolvency Theory:, February, 1994, Association of American Law Schools, Bankruptcy Workshop, October 1991) and bankruptcy lawyers (American Bar Association, October 1993, April 1990). Her curriculum vitae is attached.

Movant brings a perspective to these proceedings that may be broader and take into account more interests than those represented by the parties. Specifically, Movant has considered in depth the effect that a ruling in this case will have on a number of different interests. These different interests include creditors, both secured and unsecured, consensual and non-

consensual, debtors, shareholders, governments, taxpayers, and community in which debtors operate. She is familiar with the practical, conceptual, and theoretical problems that present themselves at the intersection of bankruptcy and environmental law and specifically with the problems that are present when the dischargeability of an environmental obligation is at issue -- as it is in this case. Movant believes that this broader perspective will bring to the Court's attention the effects of this Court's decision on persons and entities beyond the parties to this proceeding. Movant also believes she will cover the issues relating to bankruptcy policy in more detail than the parties to this action.

Movant, respectfully requests this Court to grant her leave to file the attached *Amicus Curiae* In Support of Petition For A Writ of Certiorari.

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March 24, 1994

Katherine Heidt
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Re: Torwico Electronics, Inc. v. State of New Jersey, Department of Environmental Protection and Energy, No. 93-1187 (U.S. petition for cert. filed Jan. 24, 1994)

Dear Ms. Heidt:

Enclosed please find a copy of the petition for certiorari in the captioned case. On behalf of Petitioner Torwico Electronics, Inc., I consent to your filing an amicus brief in the case.

Sincerely,

Adam P. Strochak

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Selected Bibliography

Books

ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (Warren Gorham & Lamont, 1993)

Articles

The Changing Paradigm of Debt and Obligation, Washington University Law Quarterly (forthcoming)

The Automatic Stay in Environmental Bankruptcies, 67 American Bankruptcy Law Journal 69 (1993)

Environmental Claims in Bankruptcy: A Fundamental Framework, 44 Florida Law Review 153 (1992)

Interest Under Section 506(b) of the Bankruptcy Code -- The Right, The Rate, and the Relationship to Bankruptcy Policy, 1991 Utah Law Review 361 (1991)

Liability of Shareholders Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 52 Ohio State Law Journal 133 (1991)

Corrective Justice From Aristotle to Second Order Liability: Who Should Pay When The Culpable Cannot? 47 Washington & Lee Law Review 347 (1990)

Cleaning Up Your Act: Efficiency Considerations in the Battle for the Debtor's Assets in a Toxic Waste Bankruptcy, 40 Rutgers Law Review 819 (1988)

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Corrective Justice: Unifying and Extending Themes of Liability (article in progress)

Use of Debtor's Tax Attributes in Bankruptcy Liquidation Proceedings (article in progress)

Short Articles

Bankruptcy and Environmental Liability: A Primer, 1 Journal of Environmental Law & Practice 39 (1994)

Counting Creditors: Further Analysis of Code Section 303(b), 1992 Norton Bankruptcy Law Advisor (November 1992)

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Selected Speaking Engagements and Presentations

The Washington University Interdisciplinary Conference on Bankruptcy and Insolvency Theory: "The Changing Paradigm of Debt," St. Louis, Missouri, February 26, 1994

Association of American Law Schools Annual Meeting: "How Superfund Mucks-Up Your Course" (Part of an all-day Mini-workshop on "Environmental Issues Across The Curriculum"), Orlando, Florida, January 6, 1994

American Bar Association: "Keeping the Bulls Out of the China Shop" (at the National Conference of Bankruptcy Judges) Orlando, Florida, October 19, 1993

Selected Speaking Engagements and Presentations (continued)

55th Judicial Conference of the Third Circuit: Moderator and Speaker, "Resolving Environmental Claims In Bankruptcy," Baltimore, Maryland, April 1993

American Bar Association: Moderator and Program Coordinator, "Chapter 11: Current Controversies, Future Fixes," (at the National Conference of Bankruptcy Judges) San Antonio, Texas, October 17, 1992

University of Texas Law School, 10th Annual Bankruptcy Conference: "The Automatic Stay In Environmental Bankruptcies," Austin, Texas, November 16, 1992

Eastern District of Pennsylvania Bankruptcy Conference:

January 29, 1994: "Confirmation and Disclosure in Chapter 11 Reorganizations"
January 30, 1993: "Ethical Issues in Bankruptcy: Pre-bankruptcy Planning"
January 25, 1992: "Environmental Obligations in Bankruptcy" January 1992

Association of American Law Schools, Bankruptcy Workshop, Faculty Member, "Bankruptcy and Environmental Law," Washington D.C., October 1991

American Bar Association, Moderator, "Recent Decisions Involving Environmental Claims in Bankruptcy," San Francisco, California, October 1991 (at the National Conference of Bankruptcy Judges)

American Bar Association, Program Coordinator, "Real Estate Bankruptcies in the 1990's," Chicago, Illinois, November 1990 (at the National Conference of Bankruptcy Judges)

American Bar Association, "Current Developments," Boston, Massachusetts, April 1990

Other Scholarly Activities and Public Service

Chair, Association of American Law Schools, Debtor-Creditor Section (1994)

Chair, Programs and Publications Subcommittee, Business Bankruptcy Committee, American Bar Association, Business Law Section (October 1993 to October 1995)

Editorial Peer Reviewer for THE BUSINESS LAWYER

Editorial Peer Reviewer for the LAND USE AND ENVIRONMENT LAW REVIEW

Member, Board of Editors for the JOURNAL OF BANKRUPTCY LAW AND PRACTICE

Interview by The Washington University School of Law Environmental Law Society. The interview appears at: 2 ELS Reporter 32 (Fall 1992)

Guest, New York cable TV program "Lawline." This half-hour show aired in the New York/New Jersey area during the month of February, 1993.

Other Scholarly Activities and Public Service (continued)

Represented a United States District Judge in opposing a petition for certiorari before the United States Supreme Court regarding attorney contempt in the federal courts (Winter 1986)

Volunteer Lawyers Action Program, Philadelphia Bar Association, (represented indigent clients in bankruptcy proceedings) (1981-1983)

Testified on the proposed federal Bankruptcy Rules and prepared a written statement on those proposed rules (1982)

Reported to the Bankruptcy Committee of the Philadelphia Bar Association on portions of the proposed Bankruptcy Rules (1982)

University and Law School Service

Academic Senate, Law School Representative (1989-1992)

President's Commission on the Status of Women, Chair (1991-92), Member (1989-92)

Various Law School Committees including Personnel/Faculty Recruitment (1989-1990 and 1993-94), Career Services (Chair 1993-94), Programs (1991-92), Placement (1990-91), Admissions (1986-1989), Long Range Planning (1986-87), Budget (1986-87), Ad Hoc Computer Committee (1985-86)

Faculty Advisor, Student team for the American Bar Association's negotiation competition (Fall 1993)

Bar Admissions Ohio, 1978; Pennsylvania, 1980

Research Awards

Selected as the Senior Nominee by Wayne State University for the 1992 National Endowment for the Humanities summer stipend

Summer Research Grant Recipient, Wayne State University (summers 1985 through 93)

References Available Upon Request

No. 93-1187

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TORWICO ELECTRONICS, INC.,
Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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THE THIRD CIRCUIT'S DECISION THAT CLEAN-UP ORDERS ARE NOT "CLAIMS" WILL DETRIMENTALLY AFFECT DEBTORS AND CREDITORS IN BOTH LIQUIDATIONS AND REORGANIZATIONS

Petitioner Torwico Electronics, Inc. ("Torwico")[1] submits this reply brief to rebut Respondent's argument that this case raises "hypothetical" questions because Torwico will liquidate and not reorganize. *See* Brief in Opp. at 8, 24-27. The State's argument is incorrect. This case involves a very concrete dispute: whether Torwico's assets will be used to pay for the cleanup ordered by the State or will be distributed to the Company's unsecured creditors. Moreover, the outcome of this case will have a significant impact on other corporations seeking to reorganize, as well as on individual debtors seeking a fresh start. For these reasons, this case is worthy of certiorari.

The precise issue presented by this case is not whether Torwico may obtain a discharge, but whether New Jersey's cleanup order is a "claim" within the meaning of section 101(5) of the Bankruptcy Code. That issue stands in such bold relief precisely because the company has ceased to operate and its productive assets have been liquidated. The present controversy is whether the estate's remaining funds should be distributed to Torwico's creditors, who properly filed claims in the bankruptcy, or spent to satisfy the State, which did not.[2] New Jersey

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[1] Torwico has no parent corporation or subsidiaries.

[2] That Torwico is the proper party to vindicate the rights of its creditors is not disputed. Torwico is a debtor in possession. The Bankruptcy Code confers on a debtor in possession all the rights (continued...)

argues that Torwico must comply with the State's order to clean up a site which Torwico does not own or operate because that order does not constitute a "claim" within the meaning of section 101(5) the Bankruptcy Code. Petitioner contends that the order constitutes a "claim" and that the State's failure to file a proof of claim bars it from participation in the distribution of the estate's assets. Torwico's argument that the order is a "claim" because it gives rise to a "right to payment" is bolstered, not weakened, by the fact that the estate is incapable of compliance except by the payment of money to a third party to perform the cleanup.

At the heart of this case is the fundamental bankruptcy concern for the equal treatment of similarly-situated creditors. That is, should Torwico's remaining assets be available for distribution to its unsecured creditors[3] on a pro

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[2] (...continued)
and duties of a trustee. 11 U.S.C. § 1107(a). A chapter 11 trustee has certain duties, 11 U.S.C. § 1106(a)(1), which include a fiduciary responsibility to creditors to account for all property of the estate. 11 U.S.C. § 704(a)(2). It therefore is Torwico's obligation to ensure that its assets are available for distribution to creditors at the conclusion of its bankruptcy proceedings. *See generally* 5 L. King, *Collier on Bankruptcy* ¶ 1107.02[2] (Matthew Bender 1993).

[3] These include, among numerous trade creditors, The First National Bank of Toms River, the assets of which were taken over and subsequently sold by the Federal Deposit Insurance Corporation. Joint Appendix, filed before the Third Circuit below, at 23; *see* Roberts, "Fidelity Won't Honor Branch Deal," *Philadelphia Bus. J.*, July 1, 1991, at 11 (discussing federal takeover and subsequent sale). Accordingly, the federal government is one of the creditors detrimentally affected by the decision below.

rata basis or may the State commandeer these funds to satisfy a prepetition obligation to clean up property Torwico does not own or operate? In essence, adoption of the State's position will give New Jersey priority over Torwico's other creditors. The State's position should be rejected and the definition of "claim" should be construed broadly to include this obligation so that all similarly-situated creditors who desire to participate in the distribution of the assets of a debtor in bankruptcy, including governmental agencies, have an equal opportunity to realize a return on their claims.

Even though Torwico itself may not be entitled to a discharge under the Bankruptcy Code, the Third Circuit's decision will undermine the efforts of other debtors to obtain a "fresh start." The Third Circuit's decision, if left to stand, will prevent other corporate debtors from reorganizing because they will be unable to resolve their prepetition, off-site environmental cleanup liabilities in the bankruptcy case. Indeed, Torwico originally sought to reorganize but was unsuccessful in substantial part because it could not bear the cost of satisfying the State's cleanup order if that obligation was not treated as a "claim" subject to discharge. Under the Third Circuit's decision, Torwico's prepetition liability for cleanup of its former manufacturing facility would have survived the bankruptcy and passed through to any reorganized entity, making its post-confirmation financial viability uncertain at best. It is disingenuous for the State to term Torwico's argument in favor of a fresh start "hypothetical" when the very thing that made reorganization infeasible in this case was the State's position—adopted by the Third Circuit—that Torwico's prepetition cleanup obligations could not be treated as a "claim."

The Third Circuit's opinion below has important ramifications that reach beyond the fate of Torwico's remaining assets and the cleanup of contamination at a single site in Lakewood, New Jersey.[4] The definition of "claim" is a potential issue in any bankruptcy, regardless of whether the debtor will reorganize or liquidate. If the decision below is upheld, governmental agencies will undoubtedly attempt to circumvent the carefully constructed protections afforded to debtors and creditors by the Bankruptcy Code simply by issuing orders requiring debtors to clean up prepetition contamination at sites they do not own or operate. It is for that reason, as well as to determine the disposition of its own assets, that Torwico asks this Court for a writ of certiorari.

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[4] Indeed, if cleanup of the New Hampshire Avenue site without the expenditure of public funds was New Jersey's only goal in this litigation, it could have achieved that result years ago by ordering the property owner to conduct the cleanup under the Environmental Cleanup Responsibility Act's joint and several liability scheme. *See* Pet. at 3 & n. 4; N.J. Stat. Ann. § 13:1k-6 *et seq.* (1991). It is clear that New Jersey's real interest here is the precedential value of the Third Circuit's decision for future cases—cases which certainly will involve reorganizing debtors.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

April 6, 1994

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